

The Central Law Journal.*ST. LOUIS, DECEMBER 3, 1880.***CLAIMS TO INTEREST ON PRINCIPAL.**

That the law relating to the payment of interest by persons who owe a sum of money is not altogether clear and defined, is manifest from the judgment of the Court of Appeal in *Webster v. British Empire Mutual Life Ass. Co.*,¹ reversing the decision of the Master of the Rolls. The facts in that case may be stated very briefly. The defendants refused to pay the policy money to the equitable mortgagee of the assured in the absence of his legal personal representative. In an action brought by the mortgagee to recover the money, the question was raised whether the defendants were liable to pay interest on the sum from the time at which it was payable under the policy. The Master of the Rolls decided the question in the affirmative.

The law books are full of cases relating to a creditor's right to interest. The Court of King's Bench decided in *Gordon v. Swift*,² that, though an agreement for the sale of goods, which afterwards were delivered, named a certain day for payment, interest did not run from the day named. Lord Ellenborough then expressed the opinion that the giving of interest should be confined to bills of exchange and such like instruments, and to agreements reserving interest. A new feature occurred in *Marshall v. Poole*,³ and the court decided that where goods are sold and delivered upon an agreement by the vendee to pay for them by a bill at a certain date, as interest would have run upon the bill if given, it might be recovered in an action for the price of the goods, such action being brought after the time when the bill would have become due. The ground of the decision was, that the interest might be properly considered as parcel of the price of the goods sold and delivered. Lord Ellenborough asked, in *Culton v. Bragg*:⁴ "If interest were demandable generally upon money due,

why should it have been thought necessary to introduce, as it has prevailed in practice, a particular count for interest agreed to be paid where the law would have given it without such an agreement?" Mr. Justice Grose remarked, in the same case, that during all his experience he had never known interest given upon money lent, or upon money due for goods sold, or, in short, in any other case, than for a contract for interest express or implied. Sir Wm. Grant, M. R., held, in *Lowndes v. Collens*,⁵ that, under a written contract for a sum of money payable on demand or on a day certain, interest is, in equity as well as at law, payable from the time of demand made, or from the fixed period of payment. The contention in the case was, that in equity interest can be given only upon the ground of contract.

In *De Havilland v. Bowerbank*,⁶ the action was for money had and received. Lord Ellenborough ruled that the plaintiff was not entitled to interest, even from the time of making a demand of the principal, unless first, he gave in evidence an express promise to pay interest; or secondly, showed something from which a promise to pay could be inferred; or thirdly, proved that the money had been used by the defendant, and interest had been made of it. These rules applied to the case where money of the plaintiff had come into the hands of the defendant. The case of bills of exchange and promissory notes appears to come under the second head. Lord Ellenborough stated in the subsequent case of *Kingston v. M'Intosh*,⁷ where the question was whether in an action upon a policy of insurance, interest could be claimed: "I can not advise a jury to allow interest upon a policy of insurance, more than upon book debts and in all other cases where a sum of money is found to be due from the defendant to the plaintiff. I dare not usurp a power which the legislature has not conferred upon me, and which has not been exercised by my predecessors." This decision was anterior to the passing of 3 & 4 Will. 4, c. 42. Agents in *Wolfe v. Findlay*,⁸ received trust money with notice of the trust and in-

¹ 43 L. T. R. (N. S.) 229.² 12 East, 419.³ 13 East, 98.⁴ 15 East, 223.⁵ 7 Ves. 27.⁶ 1 Camp. 50.⁷ 1 Camp. 518.⁸ 6 Ha. 66.

structions to pay it to the person who could give a legal discharge. No demand having been made, Vice-Chancellor Wigram held that they were not liable to pay interest. This was quoted in *Crossley v. City of Glasgow Life Ass. Co.*,⁹ in support of the proposition, that a court of equity will not allow interest where there has been no person legally entitled to receive the money. Sir Geo. Jessel, M. R., however, refused to be bound by it.

It is clear from the foregoing that, whatever unanimity may exist amongst the learned judges with reference to some points in the law relating to interest, a difference of opinion prevails with regard to the point debated in cases such as *Wolfe v. Findlay and Webster's Case*. In the Court of Appeal, Lord Justice James stated the rule of law to be that, "a policy of assurance does not bear interest. In itself there is neither an express nor an implied contract to pay interest on the amount payable. * * * * Whether it comes within any common law principle or not, anything in the nature of interest can only be given, in my view, as damages for the wrongful detention of money which ought to have been paid." Lord Justice Thesiger adopted the principle laid down by Lord Westbury, in *Caledonian R. Co. v. Carmichael*,¹⁰ viz., that "interest can be demanded only in virtue of a contract expressed or implied, or by virtue of the principal sum of money having been withheld, and not paid on the day when it ought to have been paid." The 28th section of 3 & 4 Will. 4, c. 42, enables a jury "to give damages in the nature of interest * * * * in actions on policies of assurance made after the act was passed." Lord Justice Cotton remarked that claims to interest are thus "referable to the principles upon which damages can be given." Hence the question arose whether there was anything to justify the finding of Sir George Jessel, that there was default or neglect to pay the money on behalf of the defendants. The Lord Justices were unanimous in holding that there was no default. Mr. Justice Bayley had already said in *Cameron v. Smith*,¹¹ that "although by the usage of trade interest is allowed on a bill, yet it constitutes no part of

the debt, but is in the nature of damages which must go to the jury, in order that they may find the amount; and it is competent for them either to allow five per cent. or four per cent., or they may even allow nothing in case they are of opinion that the delay in payment has been occasioned by the default of the holders." We may remark that the rule as to claims to interest is to be gleaned from the above observation of Lord Westbury, and those of Sir W. Grant in *Lowndes v. Collens*, the latter being taken with some modification. The rule given in the latter case is that, wherever there is a written contract for a sum of money payable upon demand upon a day certain, interest is payable from the time of the demand made, or from the fixed period of payment, and there is no difference whether that contract is contained in a promissory note or any other instrument; but, as Lord Justice Thesiger pointed out, the interest is only payable where there is default by the person who has to pay the principal sum.

ROMANCE IN THE FORUM—ADMINISTRATION ON THE ESTATE OF A LIVING PERSON.

Below we print the dissenting opinion of Freeman, J., in the case of *D'Arusmont v. Jones*, lately filed in the Supreme Court of Tennessee. The majority opinion was printed in our issue of Sept. 24th past. 11 Cent. L. J. 253. Apart from the unusual interest which always attaches to a case of administration granted on the estate of an actually living person, and the cogent arguments advanced on both sides of the discussion between the judges of the Tennessee Supreme Court, the case now decided presents so many features of romantic interest as to entitle it to preservation in the legal annals of America, for other purposes than discussion of the legal principles involved. It seems that the complainant, Mlle. Frances

ADMINISTRATION ON ESTATE OF LIVING PERSON—JURISDICTION OF PROBATE COURT IN SUCH CASE.

D'ARUSMONT v. JONES.

— Supreme Court of Tennessee, April Term, 1880.

FREEMAN, J., dissenting.

I am unable to agree with the conclusion reached by the majority of the court, for the following, among other, reasons: I think it a principle that runs through all our jurisprudence, that acts done by parties having *prima facie* legal authority to do them, as to third parties, are valid. The party may not be able to make good his claim to the position assumed by him, or the authority claimed, when brought di-

⁹ L. R. 4 Ch. Div. 421.

¹⁰ L. R. 2 Sc. & D. App. 56.

¹¹ 2 B. & Ald. 305.

Sylva D'Arusmont, is the daughter of the renowned Fanny Wright, a lady of Scotch origin, who was a contemporary of Robert Dale Owen, and a sharer in his socialistic schemes. Miss Wright came to America in 1825 with Lafayette, and soon after she purchased, at Germantown, near Memphis, Tennessee, a large tract of land known as the "Nashoba Springs" estate. This property she conveyed to Lafayette and others as trustees, under the trust to establish thereon a school and asylum for the blacks, with the design of not only educating them, but also furthering their emancipation. This project failed; the trustees re-conveyed the Nashoba property to the grantor, and at her death, the lady, who had become the wife of a French count named D'Arusmont, left the estate by her will to her daughter, Mlle. Frances Sylva. Out of some of this land grew the litigation above referred to. In 1860, there came to Tennessee with Mlle. D'Arusmont, for the ostensible purpose of overseeing and caring for her American property, a Frenchman named De Lagutry. To him she deeded, on certain conditions, the larger part of the Nashoba tract; and he then commenced to improve it on a magnificent scale. A town was laid out, streets were opened through the forest, railroads and turnpikes were projected, and the "Nashoba Springs" were to develop into a new Saratoga. Soon Mlle. D'Arusmont departed from Tennessee and from this country. It was this absence, which, when prolonged, gave rise to the supposition of her death, and brought about the administration on her estate, which has now been held void in the case of D'Arusmont v. Jones. De Lagutry followed the lady, leaving the Nashoba

tract in charge of one Patten, who spent considerable money in carrying out the plans of De Lagutry, and under his directions, as was claimed. The prevalence of the war stopped the work of improvement; and after the war, Patten, claiming a lien on the lands for his expenditures, obtained a title to the tract under a judicial decree. De Lagutry and Mlle. D'Arusmont were now both supposed to be dead, and the estate of the latter was under process of administration. At this juncture counsel appeared in the courts of Tennessee, in behalf of the children of De Lagutry, and sought to impeach Patten's decree and to reclaim the lands from him. A litigation of several years between these parties resulted in a division of the lands by agreement, Patten and the De Lagutry heirs each taking a moiety. Just as this division was about being executed, in 1875, Mlle. D'Arusmont again appeared upon the scene, and without making any adequate explanation of her thirteen years' absence, instituted the suit against Jones and others, against Patten and the De Lagutry heirs, seeking to recover all her property. These suits, as the opinions of the court in the Jones Case show, operated with great hardship on all the interests which parties had acquired on the faith of the adjudication of the probate court that Mlle. D'Arusmont was dead. After remaining in Memphis and vicinity for about six months, the lady returned to Europe, where she still remains, leaving to her attorneys the prosecution of her suits, one of which the decision above referred to shows she has gained. During her thirteen years' absence she had been married to De Lagutry, confiding in his statement that a former wife was dead; but she dropped the

rectly in question; and he may be declared not entitled to it, or his authority revoked, or declared invalid; yet as to third parties acting on the faith of the apparent authority, they are protected, and the acts done are valid, as if the authority was complete, or the position assumed by the party was one to which he had the legal right. The case of an officer *de facto* illustrates this principle. The party who is in an office, and who assumes its functions, whether he has authority by law to do so or not, may do all the acts incident to such office, and as to third parties, they are held as valid and effective as the acts of an officer *de jure*. Surely, the act of a court of competent jurisdiction ought to have equal validity and equal force, where the fact of want of jurisdiction does not appear on the face of its proceedings, as it does not in this case, but has to be made out by independent proof *dehors* the record.

But this case is still stronger. On the facts as presented to the court at the time of granting the letters of administration, that is, proof of absence from the country for seven years, without being heard from, the court could not have refused to grant the letters of administration, because it had power to grant letters on legal evidence of death of a party, and these facts constituted such evidence. When shown, the law said she was dead; it was legal proof of the fact; in law, the fact of death appeared to the court. If administration had been refused, the applicant could have appealed to the circuit court; and if refused there, on these facts, this court would have reversed their action and compelled the grant. Is it possible

that, on this state of facts, the act is void and confers no authority? It might be in such a case that the letters would be granted on proof of a state of facts giving legal authority for the action of the court, and under a judgment of this, the court of last resort in the State; and that, a judgment perfectly valid on its face, the only one the law allowed; and yet on the theory of the majority opinion, all the acts done under this judgment would be void, and third parties would be held to have obeyed the judgment at their peril, and in their own wrong. Suppose the county court had refused to grant the letters on *procedendo* and mandate from this court; would not a *mandamus* be issued to compel them to do so? If, on mandate to do so, after the right had been adjudged, the justices had refused to comply, would we not commit them for contempt? Most assuredly. Can we rightfully compel a court or any one else to do an act not authorized by law, but forbidden by it? If it be required by law, can it be void by the same law? If so, why, and by what process of reasoning is the conclusion reached? I am at a loss to see the reason. The opinion furnishes none. The act, then, of the court, was legal when done. If so, was not the authority conferred by it also legal? What was that authority? To collect the assets, the debts due the adjudged intestate, and to enforce such collection by process of law, if necessary. He could then compel the payment of these debts in this case. If so, it was the legal duty of the debtor to pay, so that we have the strange conclusion, that what the law compels a man to do is unlawful, and where the

name of De Lagutry and resumed the name of D'Arusmont, on learning that Madame DeLagutry was still living.

The facts above stated are understood to be admitted as correct by all the parties interested. The romantic character of the whole story is enhanced by the statements of fact made and disputed. It will be seen in the opinion of the court, that one David Whitby had become the administrator upon Mlle. D'Arusmont's estate in Tennessee. The majority opinion says that "Whitby, to whom administration was granted as next of kin, turns out to be nowise related to complainant, and she could not have anticipated such a proceeding." It seems that Whitby's claim was based on the assertion that Mlle. Frances Sylva was not the daughter of Madame Fanny Wright D'Arusmont, but of her sister Camilla Wright, who was the first wife of Whitby's father, and thus, that he was half-brother to Frances Sylva. It was claimed that Fanny Wright, learning of the marriage of her sister to Whitby, and disapproving of it, came to Tennessee and by force carried away Mrs. Whitby and her infant daughter,—an event which, within the memory of old residents of Memphis, came near creating a mob in that city; and that the three went to Europe together. Mrs. Whitby dying soon after, and Miss Fanny having married the Count D'Arusmont, it was charged that the Whitby infant was presented as the daughter of the D'Arusmonts, in order to facilitate the settlement of the Wright estate in Scotland. It is scarcely necessary to say that the lady most interested denied this ingenious theory *in toto*. Among the singular features of the case is the circumstance that Mlle. Frances Sylva recol-

lected distinctly being present at the wedding of her father and mother. On this theory of the parentage of Mlle. Frances Sylva, Whitby based his claim to administer as the next of kin. Another feature of this romance was the claim of De Lagutry to have been himself descended from the Guthries of Scotland, his ancestor having taken, on his removal to France, the name of De La Guthrie, which afterwards softened into De Lagutry.

To cap the climax in this narrative, whose "truth is stranger than fiction," comes the information that one romantic phase of this family history has claimed the attention of the courts of France. The *New York Herald*, in April last, copied from the French papers an account of the decision by the Paris courts, setting aside as adulterous and void, the marriage of De Lagutry to Mlle. D'Arusmont. In the French account of the matter, De Lagutry was spoken of by the name of Picault, though it was known that when he died, on Dec. 22, 1871, at Sienna, Italy, he bore the name of De Lagutry. Picault, it seems, was in 1854 an agent in Paris for the purchase and sale of real estate. The *Herald's* narrative of his dealings with the Nashoba heiress is as follows: "One fatal day Mlle. Frances D'Arusmont, an American lady, daughter of a Spanish planter, met with the handsome speculator and was impressed with his manners and conversation. She was young and handsome, spending her enormous wealth lavishly in European tours. Her father and mother had died, leaving her the sole heir to large estates at Germantown, near Memphis, and to some property in the vicinity of Cincinnati. She desired to find some man capa-

law imposes a duty, the performance is by the same law unlawful, and the act is void. If this is not self-contradictory, and an argument that destroys itself, I am at a loss to see what would be. Whenever a proposition is stated, the opposite of which is a contradiction, and absurd, we may be sure the proposition is true. So when we assert that of which the opposite is admitted to be true, we may be certain our proposition is false and unsustainable. Now we are compelled, on the theory of the opinion, to assert that the act of granting the letters, and payment by these parties, was wrong, and yet admit that it was legal and could have been compelled by law; the court and the parties could have done no how else. With all this, we now hold both acts void and illegal. The answer to this I am unable to see; and until I do, I must dissent from the conclusion based on such premises.

In reply to the radical error in the opinion, as I think it, that the court had no jurisdiction to grant letters of administration, except on a dead man's estate, I need but say, that the court had jurisdiction of the question, the subject matter. Jurisdiction is conferred by law. Whether the facts exist on which the jurisdiction could be exercised, depends on their being made to appear by proof. That was a matter for the judgment of the court, acting on the facts before it. The proof may not have been sufficient, but we are not revising that judgment, and therefore are not called on to weigh it. But, as I have shown, the case was made out, and on the facts the authority for its action was complete, and therefore the act when done was the only legal judgment that could have

been rendered. This being so, on even the principle of the opinion, that in a case of death of a party, the court had legal authority to act, because the death was legally proven, yet this act is held void, by reason of subsequent proof developed, and the effect is declared, to render all acts under this authority illegal and void. This involves the proposition that a third party is to obey the judgment of a court of competent jurisdiction, valid on its face, at his peril; that peril being, that it may turn out the proof was not sufficient, or after proof may show the court erred in what it did. This principle would be subversive of all sound policy, and compel every man to guaranty the correctness of the action of the judicial tribunals of the country. Surely the citizen ought to have some benefit from the generally conceded legal presumption in favor of the regularity of this action.

The result I would reach is, that the subsequently developed facts furnish the ground for a vacating or revocation of the letters; but being granted properly at the time, all acts done under their authority should be held valid. This, it seems to me, is more in accord with sound legal analogies, and better agrees with a wise public policy. In support of this, I suggest that such cases are rare, this being the first in this court since the existence of our State, eighty odd years. They can never occur, without more or less neglect of attention to property and interest on the part of the claimant. Such neglect and such protracted absence, without notice of whereabouts, furnish in law the ground for such an administration. The party must be assumed to have acted with a knowledge of the law

ble of superintending her estates and collecting their large revenues. Picault saw a way to realize his dreams of wealth and offered to accept the place. A few weeks later he embarked for America with the young heiress, leaving behind him his wife and three daughters, the eldest about six years of age. Regular remittances of money and frequent letters consoled the disconsolate wife during her husband's absence, which he had solemnly promised would be only temporary. After many months of anxious waiting, she was grieved to see that Picault was gradually becoming alienated, and frequently evinced a desire to remain in America. Then came requests for her to join him, which finally became so pressing that she consented. Leaving her youngest child in the care of its grandmother, she took with her the two eldest girls to the new world. She found her husband living in luxury at the home of Mlle. D'Arusmont, near Germantown. Her reception was most cordial, and whatever doubts she had of her husband's love were for the time dissipated. Soon after her arrival, however, they arose again, and with horror she beheld the diabolical plot of which she had been at once the victim and the instrument. With quick, intuitive perceptions she saw that the relations of her husband and Mlle. D'Arusmont were not merely those of heiress and agent, and that this situation had been brought about by the jealousy excited in the imperious breast of the young American by her arrival. Picault had played his game well. Mlle. D'Arusmont would not yield to his designs until the stimulus of jealousy had been added to the coquettish love excited by flattery. From the moment of his success, Picault threw aside the mask. The poor wife was discarded and treated as a servant, bearing the indignity of hearing the guilty partners converse in a tongue unknown to her, and undergoing numerous other petty slights. Her mother's letters, which had heretofore been frequent, ceased entirely. This, added to the chagrin and humiliation she already felt, made her pine for home. Thither she returned in 1860, leaving her two little girls behind her. On her arrival in France she found that her third child was well, and that her mother had been unfaithful in her correspondence. Others had intercepted the letters, and the full extent of her husband's villainy was revealed. Her only desire then was to recover the children she had left in America. Her letters to her husband remained unanswered, and she learned that he and Mlle. d'Arusmont had changed their place of residence, abandoning one

on this subject, and having made the case by his own negligent conduct, ought not to be allowed to aver the action of others on the facts as a wrong. The principle is, that no man can assign the result of his own conduct as a legal wrong, much less hold third parties responsible for such results. This is a self-evident proposition; yet the theory of the majority opinion is that it may be done. Which ought to suffer, the party who has contributed, at least in some degree, to the

of the girls, the eldest, in a convent. After two years' hard labor she saved enough from her scanty earnings to pay the passage of this child to France, and once more had the pleasure of folding it to her bosom. Picault, four years later, in 1868, had the audacity to visit Paris and demand an interview with his wife. She haughtily refused to see him—a decree of divorce had already annulled all his claims upon her. The next few years of the poor woman's life were passed in unremitting, patient labor for her two children; but her cup of grief was not yet full. She suffered the extreme agony of seeing her loved ones sicken and die, one lingering a little longer than the other, as if only to kindle her last hope in order to extinguish it. A small fortune coming to her after her mother's death, she at once set to work to trace out her other child. To find her, it became necessary to discover the whereabouts of her husband, to whose care the little one was confided. Legal inquiries were made in all directions, both in America and Europe. It was not until last August that she discovered the death of her husband, eight years before, at Sienna, and learned that he had been guilty of a bigamous alliance with his former mistress. Pursuing her researches still further, she found that the marriage had been solemnized in New Jersey, and that three children had been the issue. The woman, Frances D'Arusmont, had disappeared, and no trace could be found of the little girl for whom the sorrowing mother still anxiously searches."

Upon the appearance of this part of the romance in this country, the American press made haste to announce to Madame Picault, or De-Lagutry, that the residence of Mlle. D'Arusmont was no secret at all, and that it was well known in America that she was living near Dresden, and devoting herself to the education of her three children, with whom there still abode the young De Lagutry. We have seen no statement in the newspapers of any attempt on the part of the bereaved mother to recover this child. It may be set down as not the least among the very singular features of this whole history, that the lawful wife of Picault or De Lagutry should be known by one name in France and by another in America; and that while the interests of her own children, under the latter name, were being presented in the Tennessee courts, in a litigation at arms' length with Mlle. D'Arusmont herself, the residence of the latter was not in some one of many apparently easy modes, made known to "the sorrowing mother."

injury, or parties wholly innocent of all wrong? In fact, it may be maintained that the present complainant has made out by her own conduct the entire case, requiring the action of the county court and the grant of the administration. What she did had authorized it by law. Yet she is now allowed to come in and make innocent third parties, who acted under the acts, as she made them, suffer heavy loss for her gain. To this I can not assent.

CIVIL DAMAGE LAW—NO ACTION BY INTOXICATED PERSON.

BROOKS v. COOK.

Supreme Court of Michigan, November, 1880.

Under the Civil Damage Law, an action will not lie by the person to whom the liquor is sold against the person selling, for damages caused thereby.

Case made from Kent County.

D. E. Corbitt, for plaintiffs. *Stuart & Sweet*, for defendant.

COOLEY, J., delivered the opinion of the court:

The question in this case is, whether one who becomes intoxicated in a saloon, upon liquor there sold to him by the keeper, and who, while in that condition, has his pockets picked, may maintain an action against the keeper to recover the money taken from him? The question arises under act No. 193 of 1877, commonly called the police act, the third section of which provides, among other things, that "every wife, child, parent, guardian, husband or other person, who shall be injured in person or property or means of support, by any intoxicated person, or by reason of the intoxication of any person, or by reason of the selling, giving or furnishing any spirituous, intoxicating, fermented or malt liquors to any person, shall have a right of action in his or her own name against any person or persons who shall, by selling or giving any intoxicating or malt liquor, have caused or contributed to the intoxication of such person or persons, or who have caused or contributed to such injury."

The question is one of the construction of the statute. Is the person to whom the liquor is sold, etc., and who in consequence sustains an injury, one of the persons for whose benefit the statute is passed? The circuit court was of opinion that he is. So far as the statute attempts any enumeration of persons who may sue, they all stand in some one of the domestic relations to the person to whom the liquor is sold, given or furnished. To that extent the statute unquestionably contemplates that there shall be three persons concerned: the person selling, giving or furnishing; the person receiving and causing an injury, and the person injured. But there might be other cases equally meritorious with these, (see *English v. Beard*, 51 Ind. 489; *Bodge v. Hughes*, 53 N. H. 614); and therefore after enumerating wife, child, parent, guardian and husband, the statute extends the right of action to other persons injured.

Does it intend among the other persons who may sue to include the person himself whose intoxication causes or is the occasion or reason of the injury? Doubtless the statute might have extended its benefits to the intoxicated person; but if such were the intent, it is surprising that it was not distinctly and unequivocally expressed. It was as easy to designate the party himself as it was his wife, child, guardian, etc. Moreover, the man himself may generally be supposed to be injured in some degree by intoxication, so that his

case would furnish the most frequent occasion for a suit, if he should see fit to resort to legal proceedings. It would be very remarkable that a statute, in enumerating the persons who should share in its benefits, should omit to name the very one who would most often be entitled to its aid. But 'tis a sensible and well understood rule of construction that when, after an enumeration, the statute employs some general term to embrace other cases, the other cases must be understood to be cases of the same general character, sort or kind with those named. *Hawkins v. Great Western R. Co.*, 17 Mich. 57; *McDade v. People*, 29 Mich. 50, and cases cited.

Apply this rule here, and the party intoxicated is excluded. The persons enumerated are persons who stand to him in special relations, and it is therefore to be assumed that "any other person" who may sue must also stand to him in some special relation, so as to be injured by his intoxication or by the sale, etc., to him. A creditor might perhaps stand in that relation under some circumstances, or a contractor, or servant, or the master of a vessel, or a traveler passing him in the street, and so on. But he could not stand in any such relation to himself, and therefore can not be understood as embraced in the terms, "wife, child, parent, guardian, husband or other person," injured in person, property or means of support by himself, or by reason of his intoxication or by the sale, etc., of intoxicating drinks to himself. The statute evidently contemplates three parties—seller, receiver and injured party—in all cases.

It is possible that the facts of any particular case may be such as to connect the saloon keeper with the injury or loss in such a way as to give a right of action at the common law. What we have said above has no reference to or bearing upon such a case.

The judgment must be reversed, with costs of all the courts.

NOTE.—See *Aldrich v. Harvey*, 10 Cent. L. J. 239.

MEASURE OF DAMAGES ON RECLAMATION OF LAND.

AIKEN v. SETTLE.

Supreme Court of Tennessee, December Term, 1879.

Where land is reclaimed from an invalid sale, as, for instance, by a person lately under disability, and the land has depreciated in value since the invalid sale, the measure of restitution to be made by the claimant is not the purchase money he received but the purchase money paid by the party from whom the land is reclaimed.

The complainant sought to reclaim by bill in chancery a parcel of land which she had formerly, when a *feme covert*, conveyed by an invalid sale. The land having in the meantime passed through several hands, and being greatly depreciated in

value, the defendant insisted on being recompensed for the land, in an amount equal to the price for which complainant had sold it, which was much greater than the price for which defendant had purchased it.

McPHAIL SMITH, Special J., delivered the opinion of the court.

This question is, whether the restitution to be made upon reclamation of lands invalidly sold must always consist of the full amount of the purchase money and interest, however long ago the sale may have been and however greatly the land may have depreciated; or whether there should not be some limit short of this, and if so, what this should be. When the former opinion was prepared, this was not considered a practical question in the case; and, as stated, it was not impossible that what will be found to have been paid for complainant's remainder, with interest all the way down to C. K. Gillespie's death, may exceed the value at that time of complainant's undivided one-third of these lands. So that we feel called upon to dispose of the question that has just been stated.

Put an extreme case, suppose an invalid sale of land by one, then, and for many years continuously thereafter, under disability, just before the termination of which the land is re-sold for a small portion of the original price, it having greatly depreciated, or valuable improvements thereon having been destroyed. Immediately after the termination of the disability the land is reclaimed. Must the last purchaser receive the original purchase money with interest all the way down, amounting to possibly ten times what he paid for the land with interest? Such a requirement would of course destroy the right of reclaiming the lands; and in cases where it fell short of this, it might yet often considerably overpay the party evicted.

The last purchaser who is evicted is the only party entitled to compensation. If he is indemnified, the requirements of equity are met. He ought not to be over indemnified.

What then does the law regard as full indemnity upon an eviction? Our rule is, where there is a warranty of title to give the purchase money and interest. *Elliott v. Thompson*, 4 Hum. 99.

Some States give the value of the land at the time of the eviction, but our rule is as stated. See 4 Kent Com., marginal pages 475-7, and notes. This then, in legal contemplation, is indemnity for the loss of the land. If the last purchaser took no warranty, or bought under *fi. fa.* or at chancery sale, where no warranty was to be had, still if, when the land is to be reclaimed, he can get back his money and interest, he must be regarded as indemnified, since this is all he could recover from his vendor if he had a warranty of title.

We think, then, that the restitution to be charged upon the land in favor of the last holder, when the land is reclaimed, ought never to exceed his purchase money with interest. Treating that as having been made with a warranty, whether

in fact there was one or not, and limiting the indemnity upon eviction to the last purchase money and interest, no injustice can be done.

This limitation may sometimes seem to operate arbitrarily, and it may sometimes permit the claimant to retain some of the consideration received for the land reclaimed; but upon the whole it appears to be equitable, and it is based upon an obvious analogy.

POWER OF COURT TO PUNISH FOR CONTEMPT—TERMS OF COURT.

IN RE MILLINGTON.

Supreme Court of Kansas, July Term, 1880.

1. Courts of record have an inherent power to punish for disorderly conduct in the court room, resistance of their process, or any other interference with their proceedings which amounts to actual contempt. Section 2 of ch. 25, Comp. Laws 1879, places no limit on the power of the district court in matters of contempt, but only upon that of the district judge at chambers.

2. On May 13, 1880, an order was entered in the District Court of Cowley County, adjourning the court until Monday, May 17th. That was the day fixed by law for the commencement of the term of the District Court of Sedgwick County, a county in the same judicial district. That term commenced on that day, and the regular judge being absent, a judge *pro tem.* was elected, who held court on the 17th and 18th. The regular judge was present in Cowley County, and assumed to hold court pursuant to adjournment on the 17th and 18th, and at the time the District Court of Sedgwick County was in session. Held, that such order of adjournment was void; that the term of the District Court of Cowley County was, on those days, suspended or closed by the commencement of the term in Sedgwick County; and that the proceedings on those days in Cowley County were extra-judicial and void, and that a defendant tried and sentenced upon those days was entitled to a discharge upon *habeas corpus*.

Petition for a writ of *habeas corpus*, filed in this court on the 28th day of May, 1880, by Daniel A. Millington, who also appealed from the judgment against him in the court below.

On the 17th day of May, 1880, Hon. W. P. Campbell, judge of the thirteenth judicial district, filed in the office of the clerk of the district court of Cowley County, a certain complaint against Millington and another, in words as follows:

"(Court and title omitted.) Now, on this 17th day of May, A. D. 1880, there being reasonable grounds for believing that Daniel A. Millington and Edwin P. Greer are the editors, publishers and proprietors of a weekly newspaper called the *Winfield Courier*, published and of general circulation in the county of Cowley; and that heretofore, to-wit, on the 12th day of May, inst., the said Millington and Greer caused to be published in said paper several articles of and concerning a certain case then pending and undetermined in this court, in which the State of Kansas was plaintiff and Charles H. Payson was defendant

and, among other things, then and there published the following language, viz.:

THE PAYSON CASE.—Probably no case was ever tried in this county which has created so much interest as the trial of C. H. Payson, just terminated, with the verdict of guilty, in the district court. After the verdict, large squads of men were gathered on each corner, discussing with much warmth, and criticising scathingly those who took part in the trial, either as witnesses, attorneys, jury or judge. The majority seemed to sympathize strongly with Payson—eulogized his plea in his own defense as one of the best forensic efforts ever heard; thought that though Payson was probably guilty of something bad, he was not guilty of the offense charged in the indictment; and that if he was guilty of another offense, the prosecuting witness was equally guilty of the same offense. They criticised the county attorney for being too zealous in the prosecution, the judge as acting as prosecuting attorney, and ruling out evidence supposed to be favorable to Payson. The minority seemed to be equally sure that Payson was guilty as charged, and had been given a fair trial; that Torrance had done his whole duty, and nothing more; that the judge was fair and impartial, and that the jury could not have done otherwise than it did. The new jury of the whole public will probably never be able to agree."

And again, the following language, viz.:

"THE COURT AS ATTORNEY.—The boys tell us that in the trial of Payson, when the witness Goodrich was on the stand for cross-examination, Judge Campbell took the witness out of the hands of the attorneys and cross-examined him for an hour, in an effort to make him contradict himself. This reminds us of a case before Judge Davis, of Illinois, in which the attorney for the prosecution demanded that the case proceed to trial at the time set, though the attorney for the defense was absent. Judge Davis said: 'The case could go to trial, but would mention that a similar case happened in LaSalle county, and this court looked to the interest of the absent attorney for the defense, and,' said Judge Davis, 'you remember that we beat 'em.'"

And again, the following language, viz.:

"County-Attorney Torrance has won additional laurels in the successful conduct of the Payson case. Some are inclined to divide the credit equally between the prosecuting attorney and the judge, but we assert, and we will stick to it, that Torrance was the main prosecutor."

The court being of the opinion that the publications, such as above set forth, concerning a case pending in court, are calculated to obstruct and embarrass the administration of justice, have a tendency to prejudice the public concerning the merits of the case, and to weaken the influence and authority of, and destroy public confidence in, the tribunal trying the cause, and as such are a contempt of court, therefore, ordered that an attachment issue forthwith against the said Millington and Greer, and that they be brought before the bar of this court, and be required to answer in writing and under oath, the matters herein set forth and charged.

On the same day the respondents were arrested upon an attachment issued in pursuance of the foregoing order, and having been brought to the

bar of said court, they filed a verified answer to the complaint, as follows:

"In the matter of Daniel A. Millington and Edwin P. Greer: Now come the said Daniel A. Millington and Edwin P. Greer, editors and publishers of the *Winfield Courier*, and for answer admit that the said Millington caused the language complained of to be published in said paper of May 13th inst. For further answer, they say that the said Millington is the responsible editor of said paper, and that the said Greer is not to blame for the appearance of the said language; that it was believed by the said Millington that the case commented on was not then pending in the court, but had been disposed of, and could not be affected by such comments; that he had no intention to embarrass or obstruct the administration of justice, or to prejudice the public concerning the merits of the case, or to weaken the influence, the authority of, or destroy public confidence in, the tribunal trying the cause. It is his opinion that the two articles first quoted in the complaint, are only statements of opinions expressed of the question, on which he withheld his own views, and that the last quotation is a harmless joke, which would have no tendency to prejudice any one. The said defendants disclaim any intention to do or publish anything in these matters which is not proper in legitimate journalism. And the said Daniel A. Millington and Edwin P. Greer respectfully submit, that this court and the judge thereof have no jurisdiction to try and punish them for the supposed offense set forth in the order for their arrest."

Thereafter on that day, Millington testified substantially as follows:

"My name is Daniel A. Millington, I am one of the respondents in this proceeding. I am the responsible editor and manager of the *Winfield Courier*, and am responsible for the publications complained of therein. Edwin P. Greer is local editor, but is not responsible for the management of the *Courier*. I wrote the first two articles complained of, but did not write the third; that was written by Edwin P. Greer, but submitted to me and published with my knowledge. I did not attend court. I did not know what the testimony was, nor what took place on the trial of Payson, except what was generally talked on the streets and elsewhere as having taken place. I heard on Monday that a motion for a new trial had been made, and on Tuesday morning I heard that the motion had been overruled. At the time the paper was published, I supposed that the case had been disposed of. I heard after the paper was made up and in press, that the motion was set for hearing on Thursday. The paper was really printed on Wednesday, about two o'clock P. M., and a portion of the issue was placed in the post-office that night, although the paper was dated Thursday, the 13th. My belief was that Payson was guilty; that he had a fair trial. I did not think that there was anything in the articles complained of, calculated to embarrass the court, or which could be construed as reflecting on the judge or jury. I thought that part referring to the court as prosecutor was a mere joke, and my motive was not to reflect on the court or judge; and all the articles were published as matters of news, and not to reflect upon or detract from any one. I hardly think that the articles can be construed as being published as a joke at the expense

of the judge of this court. I do not think that the article can be construed as a statement that the court acted as prosecutor. I was asked what the punishment would be—I don't know by whom—but I said I thought that would be the last business transacted in court; I knew that was the usual way."

The *Courier* of date May 13 was then introduced in evidence, and it was admitted that the article on the third page, entitled, "The Payson Case," was written by Edwin P. Greer, who attended court during the greater part of the trial, and was by him submitted to Millington.

On the 18th day of May, 1880, judgment was rendered in said action, as follows: "It is the judgment of the court that the respondent, Daniel A. Millington, pay to the State of Kansas a fine of \$200, with costs, and that he stand committed to the jail of Cowley County until the fine and costs are paid. At the request of the respondent, execution is stayed on this judgment for ten days, to give time to the respondent to make a case and file a petition for review in the Supreme Court."

L. J. Webb, Pyburn & Brush, Chas. C. Black, and W. C. Webb, for petitioner. Davis & Jetmore, for the State.

BREWER, J., delivered the opinion of the court:

On the 17th of May, 1880, the judge of the thirteenth judicial district caused an attachment to be issued against D. A. Millington, the editor and publisher of the *Winfield Courier*, for contempt, on account of certain articles published in said paper. The same day, Millington was arrested, and after a hearing, adjudged guilty and fined two hundred dollars. This order and judgment have been brought to our consideration both by *habeas corpus* and appeal. They are challenged on various grounds, and said to be not only erroneous, but absolutely void. It is claimed that if said Millington were guilty of a contempt, the punishment imposed is one beyond the power of the court to impose, and therefore void. Again, it is urged that the court had become adjourned by operation of law, and that therefore this entire proceeding was extra-judicial and void. Further, that the articles complained of did not constitute a contempt, and had no tendency to obstruct the administration of justice. And still further, that the answer of said Millington fully exonerated him.

It is obvious that some of these matters are not open for consideration in the *habeas corpus* proceeding. For in that, only questions of power, and not questions of error, are before us.

The first proposition is, that the district court has no power to impose a fine of \$200 for contempt. This is claimed under § 2 of ch. 28 of the Compiled Laws of 1879. That section reads as follows: "The judges of the district courts, within their respective districts, shall have and exercise such power in vacation, or at chambers, as may be provided by law; and shall also have power in vacation to hear and determine motions to vacate or modify injunctions, discharge attachments, vacate orders of arrest, and to grant or vacate all necessary interlocutory orders, and to punish for contempt in open court, or at cham-

bers, by fine not to exceed one hundred dollars, and imprisonment, or either, and to assign not exceeding one attorney to prisoners who may be unable to employ counsel." The argument is, that as the Constitution provides that the district courts shall have such jurisdiction as may be provided by law, (Const., art. 3, § 6,) and that as this is the only section in which the power of the court or judge to punish for contempt is named, it includes all the power vested in a court or a judge in matters of contempt.

We do not agree with counsel in these views. The plain language of the section is a grant of power to the judge, and not to the court, and the Constitution provides that the several justices and judges of the courts of record in this State shall have such jurisdiction at chambers as may be provided by law. Const., art. 3, § 16. The section all the way through grants power to the judge, and not to the court. It is true, it speaks of "contempt in open court or at chambers," but it grants no power to the court—it simply provides what the judge may do in such cases. The prior section grants power to the court, and gives it "general original jurisdiction of all matters, both civil and criminal (not otherwise provided by law)." It may be conceded that the language of § 2 is not altogether apt or happy; but as we construe it, it contains only a grant of power to the judge in vacation in pursuance of said § 16 of the Constitution, and gives to him a power at chambers to punish for a contempt committed in open court. Such is the plain reading of the language; and when we notice that the prior section grants power to the court, the obvious meaning of the language seems imperative. If it be contended that without this sec. 2 no power is in terms granted to the district court to punish for contempt, we reply that it is one of the prerogatives—one of the inherent powers of a court—that it may punish for disorderly conduct in the court-room, resistance of process, or any interference with its proceedings which amounts to actual contempt. The statute in terms nowhere gives to this court, which is the final tribunal, the ultimate arbiter of all rights and disputes between litigants, the power to punish for contempt of its proceedings and orders. And yet, is it possible to suppose that this court may not punish for a disturbance in its court-room, or for a resistance of its process? Bacon's Abridgement, title, Courts; *ex parte Robinson*, 19 Wall. 505; *Morrison v. McDonald*, 8 Shep. 550; *State v. Woodfin*, 5 Ired. 199. So far as judges of the district court acting in vacation or at chambers are concerned, the legislature has limited their powers, though even as to them, it has placed no limit on the term of imprisonment they may impose. Upon the power of justices of the peace, it has also placed a limitation. Comp. Laws 1879, p. 732, §§ 199 and 200. But as to courts of record, it has left their powers to punish for contempt free and open to all the necessities of the occasion. There are exceptions to this, as in the matter of disobedient witnesses, etc.; but outside of the several named limitations,

the power of courts of record to punish for actual contempt is left free to the actual necessities of the wrong. A poor farmer who resists the process of the court may be fully punished by a fine of one hundred dollars; but a railroad magnate, who tries to rob the county or defies the process of the court, would laugh at such a fine. The legislature has wisely left the power of the court equal to the wrong attempted. Any resistance of the power or process of a court of record of this State may be punished by a fine large enough to recompense the State for any loss it may suffer, and large enough to deprive the offender of any profits he may hope to receive from his wrong. That this power is a vast one, may be conceded; that its exercise may sometimes be necessary, is clear; and to guard against any wrongful exercise of this power by the lower courts, is the reviewing power of this court, and as to all courts the power of impeachment and the severe review of public opinion. With these checks it would seem that the power, though vast, is safely lodged. All power is in a certain sense dangerous; but with an elective judiciary, a free press and the power of impeachment, the people can soon relieve themselves of a corrupt or partial judge. Power must reside somewhere—power to compel or restrain action, and the vast volume of the testimony of experience is that nobody is so safely trusted with power as the courts.

A second proposition of counsel is that the district court of Cowley County, the county in which these proceedings were had, had become adjourned by operation of law, and therefore "at this entire proceeding was extra-judicial and void. The facts are these: This proceeding was commenced and trial had on the 17th day of May, and judgment rendered on the 18th. The 17th was the day fixed by law for the commencement of the term of the district court in Sedgwick County; and in fact both on the 17th and 18th, and at the times these proceedings were had, the district court of that county was in session, a judge *pro tem.* having been elected in the absence of the regular judge. It also appears that the district court of Cowley County, which had been in session for some time, was on the 13th adjourned over the 14th and 15th, and to the 17th, the day for the commencement of the Sedgwick County term. Now upon these facts it is contended that two terms of the district court can not be held in the same district on the same day, and that as the 17th was the day fixed by law for the commencement of the Sedgwick County court, the adjournment of the Cowley County court to that day was virtually an adjournment *sine die*; or at least, that the Cowley County court could not be held upon that day, or until some adjournment had been made of the Sedgwick County court. In the case of *State v. Montgomery*, 8 Kas. 358, it was decided that the district court could adjourn the term in one county to a day subsequent to that fixed by law for the commencement of the regular term in another county of the same district. But this presents a very different question. Here we

find the district court, which by the constitution has but one regular judge, being held in two counties by two judges. If this be proper, then in every county in the district, court may be held continuously, presided over in all but one by judges *pro tem.* This might have one advantage in preventing an accumulation of business, but it is against the spirit of the Constitution. That organic law of the State provides for one district judge in each judicial district, to be elected by the people of the district. Const., art. 3, sec. 5. Clearly, the idea is that this single elected judge is the sole responsible judicial officer for the district court of the entire district. Whatever provision exists for judges *pro tem.*, is not for the purpose of duplicating or increasing the judicial force, but to preserve a continuous though single force. They act for and in the absence, sickness, or disqualification of the elected judge. "The general principle is that the judiciary are elective." *State, ex rel., v. Cobb*, 2 Kas. 53. Litigants are entitled to have this principle recognized and enforced. The commencement of a term is a legislative command to the elected judge to be present and discharge the judicial duties devolving upon him in that county. It operates as a suspension of his duties in all other counties in his district, and suspends, or closes, the terms in those counties. The legislature provides for terms, in order to secure his personal attention to the litigation in each county. It prescribes the commencement of each term, leaving the time of closing to the discretion of the judge acting upon the necessities of business. It does not leave the commencement to his discretion, because it intends that each county shall have the benefit of his presence and labors at a certain and known time. The people of the entire district elect the judge. Each county is entitled to the benefit of his learning and experience. And the legislature by terms names the time of his attendance. Impliedly, thereby commanding him to attend in one county, it equally commands him to leave all the others. The case of *Grable v. State*, 2 G. Greene, 559, is strongly in point. Under similar provisions, the Supreme Court of Iowa there held that the term in one county was closed on the day the term was by law to commence in another. It says: "From the constitution of our judicial system, it is apparent that the court can not be held in two counties in the same district on the same day, and by one and the same judge." So we say here, there is but one district court and one district judge in a district. The officer is not to be duplicated, and when a term commences in one county, the court everywhere else in the district is closed, or suspended. A judge *pro tem.* is only a substitute, and never a duplicate.

It follows from these considerations that the adjournment of the Cowley court to the 17th was void, and the proceedings on the 17th and 18th in that county were extra-judicial and void. There was no court then in session in that county. *Habeas corpus* will lie in such a case, and the petitioner is entitled to a discharge. Such is the order which must be entered in this case; and in

the appeal, the order will be, that the judgment apparently rendered in court-time will be reversed, and the appellant discharged. The same order will be entered in the two cases of William Allison. Under these circumstances, it is unnecessary and probably improper for us to consider the other questions presented and discussed by counsel.

All the justices concurring.

ABSTRACTS OF RECENT DECISIONS.

NOTES OF RECENT DECISIONS.

RESTRAINT OF TRADE—AGREEMENT NOT TO FOLLOW CALLING WITHIN SPECIFIED LIMITS.—The plaintiff, for a sufficient consideration, bought of the defendant his business as a dentist, and the latter executed a contract not to practice dentistry "within a radius of ten miles of Litchfield." The town of Litchfield has an extensive territory and irregular outline, and contains the village of Litchfield, in which the defendant dwelt and had his office at the time, and where the contract was drawn and executed. *Held*, that the above expression meant "within ten miles of the center of the village of Litchfield." And *held* that the contract was not void in not fixing a period within which the defendant was not to practice dentistry within those limits. It seems that where such a contract is reasonable when made, subsequent circumstances, such as the covenantee's ceasing to do business, do not affect its operation. New trial not advised. Supreme Court of Errors of Connecticut. Opinion by LOOMIS, J.—*Cook v. Johnston*. 22 Alb. L. J. 412.

WHEN DEMAND BEFORE ACTION FOR CONVERSION NOT NECESSARY.—Where one in good faith purchases personal property from one having no authority to dispose of the same, an action to recover such property may be commenced by the true owner against the purchaser without demand, and the statute begins to run from the time of the purchase. *Affirmed*. Supreme Court of California. Opinion by SHARPSTEIN, J. MYRICK and MCKEE, JJ., dissenting.—*Harpending v. Myers*. 22 Alb. L. J. 413.

CRIMINAL LAW—RECEIVING STOLEN GOODS—MARRIED WOMAN—MAY BE CONVICTED WHEN ACTIVE IN CRIME—PRESUMPTION FROM POSSESSION.—Defendants, who were husband and wife, were jointly indicted for receiving stolen goods, knowing them to be stolen. The goods, which were stolen from R, were found in a room of which defendants had control, adjoining the room occupied by defendants and communicating with it by a door. In her husband's absence the wife, by words and active opposition, attempted to prevent the searching officers from entering the room where the goods were. At the trial the judge instructed the jury that in law the wife was presumed to be under the control of the husband, and to have been driven to the offense by him, and consequently should be acquitted, unless the evidence was, in their judgment, sufficient to overcome or rebut the presumption. *Held*, that there was no error in thus submitting the question of the wife's guilt to the jury. The court charged that "the possession of stolen goods immediately after the larceny, if under peculiar and suspicious circum-

stances, when there is evidence tending to show that some other persons stole the property, such possession not being satisfactorily explained, would warrant the jury in convicting the accused of receiving stolen goods knowing them to have been stolen." *Held*, not error. *Affirmed*. New York Court of Appeals. Opinion by DANFORTH, J.—*Goldstein v. People*.

SLANDER—DAMAGES—SUBSEQUENT REPETITION OF SLANDEROUS WORDS—EVIDENCE OF MALICE.—In an action of slander the plaintiff can recover damages only for the slanderous words charged in the declaration. Where the same slander has been since repeated, evidence of the repetition is admissible for the purpose of showing malice in the original speaking, but not as a ground in itself for additional damages. Where a defendant maliciously, and for the purpose of spreading and perpetuating the slander, pleads the truth of the words in justification and fails to prove it, it may be regarded as evidence of malice in the original speaking of the words, and may thus tend indirectly to increase the damages; but it is not of itself a cause for which damages may be directly assessed. 18 Conn. 472; 31 Id. 289. Supreme Court of Errors of Connecticut. Opinion by GRANGER, J.—*Ward v. Dick*.

SUPREME COURT OF THE UNITED STATES.

October Term, 1880.

PLEADING—FORMER BILL DISMISSED—NECESSARY AVERMENTS IN PETITION.—(Full opinion.) "Upon the case made by the bill, the appellant is not entitled to recover. Paragraphs 9 and 10 of the bill are as follows: '9. Complainant further states that he filed his bill of complaint in said court against said defendant and said Kappell, on or about the 19th day of July, 1870, praying that said sale should be set aside, and for other matters, which will more fully appear by reference to said bill, which bill was afterwards dismissed for want of prosecution upon the part of the attorney for complainant. 10. Complainant further states that on or about the 16th day of October, 1871, he filed his second bill in said court, praying for the same relief, and that the defendant plead thereto, which bill was also dismissed for the reason of the default of a replication to said plea, the attorney of the complainant having died during the pendency of said last-mentioned bill.' Here is an express admission of record, that a bill for the same identical cause of action now sued on was dismissed for the reason that a plea which had been filed and not denied presented a good defense. What the plea was does not appear; but as the bill was dismissed absolutely, the presumption is it went to the merits. A mere averment that there has been no adjudication upon the merits, is not enough. To overcome the effect of the other allegations, the nature of the defense set up in the plea should have been stated, so that it could be seen that it did not present a bar to the action." *Affirmed*. Appeal from the Supreme Court of the District of Columbia. Opinion by Mr. Chief Justice WAITE.—*Leary v. Long*.

APPEAL—ORDER ADJUDGING FINE FOR CONTEMPT OF INJUNCTION—FINAL ORDER.—F, the defendant in error, brought a suit in equity below to restrain H, the plaintiff in error, from using a certain patented device. In this suit an interlocutory injunction was granted. Complaint having been

made against H for a violation of this injunction, proceedings were instituted against him for contempt which resulted in an order by the court that he pay the clerk \$1,389.99 as a fine, and that he stand committed until the order was obeyed. To reverse this order H sued out this writ of error, which F now moves to dismiss, on the ground that such proceedings in the circuit court can not be re-examined here. *Held*, that if the order complained of is to be treated as part of what was done in the original suit, it can not be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only. If the proceeding below, being for contempt, was independent of and separate from the original suit, it can not be re-examined here either by writ of error or appeal. This was decided more than fifty years ago in *Kearney's Case*, 7 Wheat. 39, and the rule then established was followed as late as *New Orleans v. Steamship Co.*, 20 Wall. 392. It follows that we have no jurisdiction, and the motion to dismiss is consequently granted. In error to the Circuit Court of the United States for the Southern District of New York. Opinion by Mr. Chief Justice WAITE. —*Hayes v. Fischer*.

CONSTITUTIONAL LAW—INTER-STATE COMMERCE—TAXATION.—1. A statute of Texas regulating taxation, enacts: "That there shall be levied on and collected from every person, firm or association of persons, pursuing any of the following named occupations, an annual tax, as follows: For selling spirituous, vinous, malt, and other intoxicating liquors, in quantities less than one quart, \$200; in quantities of a quart and less than ten gallons, \$100; provided, that this section shall not be so construed as to include any wines or beer manufactured in this State, or when sold by druggists for medicinal purposes." *Held*, following *Welton v. State*, 3 Cent. L. J. 116, that the statute is unconstitutional so far as it makes a discrimination against wines and beer imported from other States, when sold separately from other liquors. A tax can not be exacted for the sale of beer and wines when a foreign manufacture, if not exacted from their sale when of home manufacture. 2. If a party be engaged exclusively in the sale of these liquors, or in any business for which a tax is levied because it embraces a sale of them, he may justly object to the discriminating character of the act, and on that account challenge its validity; but if engaged in the sale of other liquors than beer or wines, he can not complain of the State tax on that ground. In the present case the petitioners describe themselves as engaged in the occupation of selling spirituous, vinous, malt, and other intoxicating liquors, that is, in all the liquors mentioned, and others not mentioned. There is no reason why they should be exempted from the tax when selling brandies and whiskies and other alcoholic drinks, in the quantities mentioned, because they could not be thus taxed if their occupation was limited to the sale of wine and beer. In error to the Supreme Court of Texas. Affirmed. Opinion by Mr. Justice FIELD. —*Tiernan v. Rinker*.

PRACTICE—ADVANCING CASE ON DOCKET OF SUPREME COURT.—(Full opinion.) "We decided at the last term that this case did not present questions which entitled it to a hearing in advance of others standing before it on the docket. It is now suggested that No. 181, *U. S. v. New Orleans*, involves the consideration of the same questions and the construction of the same statute, and we are asked to advance this case to be heard with that. To this the defendant in error objects. When a case is advanced to be heard

with another which has precedence on the docket, the rule is to require the two to be argued as one. This rule is never departed from except under very peculiar circumstances. As we can not compel a party against his will to argue his case with another, we have always heretofore denied motions of that kind when they are resisted. There are no such special circumstances in this case as to make it proper that it be advanced and heard separately from the other. The motion to advance is, therefore, overruled, but counsel may submit printed arguments in the other case on the questions presented in that which are common to the two, provided twenty copies of such arguments are filed with the clerk at least six days before that case comes up for hearing." In error to the Supreme Court of Louisiana. Opinion by Mr. Chief Justice WAITE. —*State v. City of New Orleans*.

NEGOTIABLE PAPER—GUARANTY—PARTNERSHIP—PRACTICE—SET-OFF.—1. In Illinois, if a person not a party to a note, that is to say, not the payee or maker, writes his name on the back of the note at the time the note is made, the presumption is that he has assumed the liabilities and responsibilities of a guarantor; this presumption, however, is liable to be rebutted by the proof. 2. Where, under the Illinois statute (cap. 110, § 34), one is sued as a guarantor of a note, and he verifies his plea in the general issue by affidavit, this is an admission of the execution of the note, and the plaintiff need only prove the execution of the guaranty. 3. In an action against a partnership on a guaranty executed by one of the parties: *Held*, that the defendant could not prove that there was an agreement between themselves as partners, that neither of them should assume any liability on behalf of the firm out of the line of its regular business without the consent of the others, and that one of the defendants did not know that the liability sued on was incurred until long after the notes were made and indorsed, and that since he learned it he has always repudiated it. 3. In such an action it was not error to instruct the jury that if, as between the plaintiff and the maker of the note, the maker could not use an account on its books as a set-off against the note, the defendants as guarantors could not. In error to the Circuit Court of the United States for the Northern District of Illinois. Judgment affirmed. Opinion by Mr. Chief Justice WAITE. —*Andrews v. Congar*.

SUPREME COURT OF IOWA.

October, 1880.

PARENT AND CHILD—LIABILITY OF STEP-FATHER—PRACTICE.—1. An exception to the rule that the father is bound to maintain his infant child, and no allowance will be made to him for this purpose out of his property (*Tyler on Infancy*, 289), obtains where the parent's estate is limited, while that of the child is abundant. 2. A man who takes a child of his wife by a former marriage into his family stands in the same relation to him as to his own children. When this relation exists between the parties, the child can not recover for services rendered, and the step-father can not ordinarily recover for the support and maintenance of the child. When a man stands *in loco parentis*, he is entitled to the rights and subject to the liabilities, of an actual parent, although he may not have been legally compelled to assume that situation. 3. A demurrer is not the proper mode of raising an objection to a guardian's report; it should be by motion

for a more specific statement. Reversed. Opinion by ROTHROCK, J.—*Gerdes v. Weiser*.

REPLEVIN—DAMAGES—INNOCENT WRONGDOER.

—1. In replevin, where the plaintiff seizes the property upon his writ, and the defendant succeeds in the action and is found to be the absolute owner of the property, and is therefore entitled to its return, the value should be assessed as of the time of the trial. 2. The rule that where a wrongdoer expends labor on the property of another, he can not claim compensation there to, does not extend to innocent wrongdoers. Therefore, where one, under a claim of title to grain in the stack, threshed and marketed the same, and afterwards it was determined that he had no title thereto, it was *held*, that it was not error to allow him for the expense of threshing and marketing. Reversed. Opinion by ROTHROCK, J.—*Clement v. Duffy*.

CIVIL DAMAGE LAW—EVIDENCE.—1. In an action under the Civil Damage act for injuries caused by the sale of intoxicating liquors, in order that the defendant may show that he was only liable for part of the injuries complained of, he should prove that the plaintiff received compensation in the other suits for sales made during the same time he was charged with making unlawful sales. 2. In such an action, brought by the wife, evidence of her loss of standing in society and her wounded feelings, by reason of the change consequent on her husband's drunkenness, is inadmissible. Reversed. Opinion by ROTHROCK, J.—*Jackson v. Noble*.

DEBTOR LEAVING STATE—CONSTRUCTION OF "START."—The Code of Iowa, § 3076, provides: "Where the debtor of the head of a family has started to leave this State, he shall have exempt only the ordinary wearing apparel of himself and family, and such other property in addition as he may select, in all not exceeding \$75 in value." The court below found that the plaintiff had his wagon close to the house, ready to be loaded with goods; that a part of the goods was in boxes, out of the house; that the house indicated a state of preparation for removing; and that the plaintiff made such declarations as to his destination being out of the State, as would bind him in the event he had started, and thereupon ruled that these facts did not constitute a "starting," within the meaning of the law. *Held*, error. It seems that the court below was of opinion that, to constitute a starting to leave the State, it was necessary that the plaintiff should actually have set out upon the journey. If he had caused but one revolution of the wheels of his wagon, it is probable that the court would have held he had started to leave the State. The word *start*, however, is not limited to setting out upon a journey or a race. It means as well the commencement of an enterprise or an undertaking. Reversed. Opinion by DAY, J. ADAMS, C. J., and ROTHROCK, J., dissenting: If mere preparation to leave is starting to leave, then the purchase of horses or an outfit, or the winding up of one's business, with the view of leaving, is starting to leave. There is a well-defined and easily recognized distinction between preparing to leave the State and starting to leave.—*Graw v. Man-*

of special directions, only authorized to receive money in payment thereof, and does not bind his client by an agreement to receive county warrants or other property, real or personal, in payment and discharge of the debtor's liability on the note. Reversed. Opinion by BREWER, J. All the justices concurring.—*Herriman v. Showman*.

TAX SALES—WHEN INVALID—FEES FOR ADVERTISING.—1. A county can not legally collect a larger sum for advertising a tract of land in a delinquent tax list than it pays to the publisher. 2. A tax deed, founded upon a sale including the sum of seventeen cents in excess of the actual costs of advertising, will be adjudged invalid and set aside, if challenged before the running of the statute of limitations, where it clearly appears that such excess was intentionally included within the amount for which the land was sold, the excess being something for which the treasurer had no right to sell the land. Reversed. Opinion by HORTON, C. J. All the justices concurring.—*Genther v. Lewis*.

JUDGMENT—SALE—EFFECT OF SUBSEQUENT VACATION OF JUDGMENT.—Where a party plaintiff, who has obtained upon service by publication a judgment in his favor in an action in the district court to quiet his title, conveys in good faith the land to a stranger, before an application is made to open the judgment under section 77 of the Code, the subsequent vacation of the judgment does not divest the purchaser of his title. Affirmed. Opinion by HORTON, C. J. All the justices concurring.—*Howard v. Entreken*.

ELECTIONS—TWO BOARDS OF JUDGES, WHICH LEGAL.—At a city election in a city of the third class, where the regular judges fail to attend or refuse to act, and two election boards are elected by the bystanders, at different times, but both are elected before eight o'clock in the morning: *Held*, that both are elected prematurely; but that the one last elected and last organized before eight o'clock in the morning, will be deemed to be the legal board, unless something else transpires to render it illegal; and further *held*, under the circumstances of this case, that the board last elected and last organized was the legal board. Judgment for plaintiff. Opinion by VALENTINE, J. BREWER, J., dissenting. HORTON, C. J., concurring.—*Kirkpatrick v. Vickers*.

POWER OF EQUITY TO RESTRAIN SUITS IN ANOTHER STATE.—1. A court of equity may restrain a defendant who is within its jurisdiction and subject to its process from prosecuting any action or proceeding, either in the courts of this or of a foreign State. 2. But no such restraining order will be made simply because the litigation is in a foreign State, or to enforce a mere legal right, even though such right be granted by the statutes of the State, but only when there is a manifest equity which compels such restraining order. 3. A and B were residents of Kansas. A owed B a just debt. He went into Missouri, taking certain personal property with him. This property was exempt by the laws of Kansas. B commenced action in Missouri by attachment before a justice of the peace, seizing this property. *Held*, that upon the mere showing that the particular property seized was exempt, and without any showing as to A's liability to pay, or his possession of none save exempt property, or as to whether the debt was fraudulently contracted or not, or as to any fraudulent disposition of property since the contraction of the debt, a court of equity in Kansas would not restrain the prosecution of said action in Missouri. Affirmed. Opinion by BREWER, J. All the justices concurring.—*Cole v. Young*.

SUPREME COURT OF KANSAS.

November, 1880.

ATTORNEY—POWER TO RELEASE PAYMENT.—An attorney employed to collect a note is, in the absence

ACTION BETWEEN PARTNERS — ATTACHMENT WHEN NOT MAINTAINABLE—JURISDICTION.—1. The case of *Treadway v. Ryan*, 3 Kas. 347, criticised, but followed. 2. Where one partner, before adjustment of partnership accounts, brings an action against his co-partner, he can not maintain an attachment against the property of the defendant on the ground of the non-residence of the latter, unless the cause of action arose wholly within the limits of the State: *Held*, further, that upon the particular facts of this case, the cause of action did not arise wholly within the limits of Kansas. 3. In an action by one partner against a co-partner to recover one-half of the profits of the business of the firm prior to the accounting, or the ascertainment of a balance, where an attachment is sued out by the plaintiff against the property of the defendant on the ground of the non-residence of the latter: *Held*, on a motion to discharge the attachment, that the district court has the legal right to inquire and determine whether the alleged cause of action arose wholly within this State. Affirmed. Opinion by HORTON, C. J. All the justices concurring.—*Stone v. Boone*.

STOCK—INJURY BY RAILROAD—WHEN OWNER CAN NOT RECOVER.—Plaintiff was the owner of a quarter section of land, through which ran the defendant's railroad. The quarter section as a whole was enclosed with a legal fence, but there was no fence along the defendant's road, separating the right of way from the rest of the quarter section. The plaintiff turned his animal loose in this quarter section, and during the night time it was injured by the defendant's cars. The night herd law was in force in the township in which the land was situated. *Held*, that while plaintiff may be said to have confined his animal within the meaning of the statute as to all parties except the defendant, an owner of part of the premises within the enclosure, he can not be held to have so confined it as to the defendant; and hence, there being no negligence on the part of the defendant except in not having a fence along its right of way, he can not recover for the injury. The obligation of the plaintiff to confine his animal, and that of the railroad to fence its right of way are of equal force, and he who disregards the one can not recover of the other for injuries resulting alone from their concurrent disregard of statute obligations. Reversed. Opinion by BREWER, J. All the justices concurring.—*Kansas, etc. R. Co. v. Landis*.

SUPREME COURT OF INDIANA.

November, 1880.

RIGHT OF RECEIVER TO BRING SUITS IN HIS OWN NAME—COMPLAINT.—There is no statute in this State authorizing a receiver to bring actions in his own name for the recovery of debts due the person or corporation for whom he is receiver. Under section 16 of the corporation act, 1 Rev. Stat. 369, providing for the appointment of a receiver for corporations against which judgments have remained unpaid for one year, this court has held that in such cases the receiver may sue in his own name. 38 Ind. 211. But in this case the receiver was appointed in a proceeding supplementary to execution, and the case is not within the above statute. Under section 205, 2 Rev. Stat. 116, the court appointing a receiver has power to authorize him to bring actions in his own name to collect debts, etc.; but the complaint will be bad if it does not aver that the court which appointed

the plaintiff as receiver, authorized him to bring actions in his own name in matters concerning the receivership. Reversed. Opinion by WORDEN, J.—*Garver v. Kent*.

CRIMINAL LAW—WHEN JUROR INCOMPETENT FOR OPINION FORMED.—The appellant and one Wade were jointly indicted for murder, and having elected to be tried separately, Wade was tried first. One of the jurors who tried the appellant said on his *voir dire*, that he had read the accounts of the murder as published in the papers, and also the testimony given at the trial of Wade, as so published, and had formed and expressed an opinion therefrom of the guilt of appellant; that the evidence in the case would have to be materially different from what he read, or he would still retain his first opinion; and that his first impression would hang to him pretty rigidly. In answer to a question by the court, he said that if the evidence in the case should be materially different from that in the Wade case, he would be governed by it entirely; but that if it should be nearly the same, the evidence in the Wade case might have some influence. The answers of the other juror were similar. He said he thought he could lay aside his opinion already formed, but that "it might pull him over a little." *Held*, that these jurors were incompetent to sit in the case, within the meaning of the statute, and it was error for the court to overrule the defendant's challenges to them for cause. Reversed. Opinion by HOWK, J.—*Brown v. State*.

CRIMINAL LAW—EVIDENCE—REASONABLE DOUBT—INSTRUCTIONS.—On a trial for murder, it is not competent for the defendant to prove that a month or two before the crime was committed, the defendant told different persons that he was going to Michigan to live, the declarations being uncoupled with simultaneous acts. 2. The following instruction given to the jury, to wit: "Facts and circumstances to be considered against the accused must be proved to be true beyond all reasonable doubt, and those tending in his favor need only be proved by evidence sufficient to cause a reasonable belief in their truth," was not erroneous. Its meaning was that facts which tend against the accused must be proved beyond all reasonable doubt before the jury can consider them, while facts tending in his favor may be considered if proved by evidence sufficient to cause a reasonable belief in their truth. If anything, the instruction was too favorable to the accused. Evidence, whether for or against the accused, must be weighed by the same rule; but the sum of the evidence must exclude a reasonable doubt of his guilt. 3. There is no error in refusing to give instructions asked by the defendant, when the instructions given by the court cover the entire case. 4. A new trial was sought on the ground that after the defendant's trial, the person jointly indicted with him for the murder had admitted that she killed the deceased. *Held*, that the evidence was not such as entitled the defendant to a new trial. Proof of the guilt of his co-defendant in the indictment would not tend to show the innocence of the defendant, nor raise a doubt in his favor. Affirmed. Opinion by BIDDLE, C. J.—*Wade v. State*.

QUESTION PRESENTED FOR FIRST TIME ON REHEARING.—A question which is presented for the first time by petition for rehearing will not be considered. The Supreme Court will not, upon the filing of such a petition, re-open a cause for the purpose of inquiring whether there is a defect in the record of which the petitioner could have availed himself when he filed his original brief. The appellee is as much bound to present in the first instance, all the questions relied upon by him as the appellant is, and his failure to do

so operates in the same way. Petition for rehearing overruled. Opinion by NIBLACK, J.—*Underwood v. Sample*.

SUSPENDED ATTORNEYS—RESISTING RE-ADMISSION OF.—1. Section 780 of the Code, granting the power to any person to move for the removal or suspension of an attorney, carries with it the implied power to resist the readmission of an attorney after he has been suspended from practicing law. The office of an attorney is quasi public, and his conduct semi-official. 2. No pleadings in an application for readmission by a suspended attorney are necessary, and hence, there could be no available error in the rulings of the court upon the papers in the case. 3. Such proceeding not being a civil action, the appellant was not entitled to a trial by jury; in a proceeding to suspend an attorney the accused is entitled to a jury trial. See 9 Ind. 558; 23 Ind. 204; 32 Ind. 214; 46 Ind. 187; 51 Ind. 487; 57 Ind. 388; 59 Ind. 25. 4. By the Constitution, every person of good moral character, being a voter, shall be entitled to practice law in all courts of justice. The fact that the appellant was honest and upright in his business relations outside of his profession, is not equivalent to being a person of good moral character. Such business relations might admit the grossest misconduct in the practice of his profession. The court found that appellant had been honest and upright in his business relations outside of his profession, but added that his general reputation for morals was not good. The facts stated do not show that appellant was a person of good moral character at the time he sought for readmission. Affirmed. Opinion by BRIDLE, C. J.—*Ex parte Walls*.

SUPREME COURT OF ILLINOIS.

November, 1880.

EQUITY—NO JURISDICTION TO ENFORCE LIEN FOR TAXES.—1. A court of chancery has no jurisdiction to enforce the lien upon real estate given by statute for taxes assessed thereon. Such lien is purely legal in its character, the creature of the statute, not arising upon contract, and can be enforced in the mode provided by the law of its creation, and in no other mode. 2. If the revenue law be defective in respect of the remedy provided for enforcing such a lien, that is a matter of legislative concern, not calling upon the courts to provide a remedy by extending the equitable jurisdiction beyond its recognized limits. 3. Nor does the fact that it is the State which is seeking to enforce the lien, operate in any way to change the rule upon the question of jurisdiction. The officers of the State, in the collection of revenue, are as much bound to observe the law and to proceed in the mode pointed out by the statute, as an individual is required to observe the law in the enforcement of any right. Affirmed. Opinion by CRAIG, J.—*People v. Biggins*.

CONTRACT—OF DOUBTFUL PROPRIETY NOT ENFORCEABLE IN EQUITY—INJUNCTION TO RESTRAIN USE OF NAME.—1. An agreement to admit a person into a medical institute and assist in the graduation and granting to him a diploma, in consideration of such person abandoning a fictitious name nearly the same as that of the other party, a member of the faculty, is of such doubtful propriety that equity will not lend its aid to enforce it. The granting of diplomas to students in colleges ought not to be made the subject of private contracts with individual members of the faculty for personal advantage to themselves.

2. A bill by Henry Olin, who was a physician treating diseases of the eye and ear in the City of Chicago, charged that the defendant, Bates, had assumed the fictitious name of Andrew G. or A. G. Olin, and was engaged in practicing his profession in the same city, whose business was treating venereal diseases; that in such name he advertised extensively both in the newspapers and by publications and pamphlets largely circulated, by which means the complainant's reputation was injured, many taking him for the defendant. It appeared that defendant had been practicing in the city under the same name before the complainant came there; the bill sought to enjoin the defendant from the use of name Olin. On the hearing the bill was dismissed: *Held*, that the bill was properly dismissed for want of equity. Affirmed. Opinion by SCOTT, J.—*Olin v. Bates*.

POWER OF ATTORNEY TO CONFESS JUDGMENT—MAY BE EXERCISED IN VACATION.—1. When a power of attorney authorizes any attorney-at-law of the State to appear before any court of record in the State, and confess judgment for the amount due upon a note to which it is attached, and an attorney's fee, the power may be exercised by the confession of judgment, either in term time, or in vacation, before the clerk of the court. 2. The doctrine is well settled, and has often been recognized by this court, that the power to confess a judgment must be clearly given and strictly pursued, or the judgment will not be sustained. But this rule, like all others, has its reasonable limitations, and must not be applied so rigidly as to defeat the manifest intention of the parties to the instrument granting the power. 3. For the purpose of suing out writs, entering judgments upon powers of attorney, and, perhaps, in other matters, the circuit courts are open at all times, except on Sundays and legal holidays. But where the business requires a judicial inquiry, it can only be done during term time. 4. Where a judgment is entered in the circuit court in vacation, in pursuance of a proper warrant of attorney, as soon as the entry is made, it becomes by the force and sentence of law a judgment in a court of record, and as such has the same force and effect as any other judgment. 5. When a power of attorney authorizes a thing to be done generally without any limitation as to the manner of doing it, and it may be lawfully done in two or more ways, the donee of such power may execute it in either of the ways, and it will be well executed. Affirmed. Opinion by MULKEY, J.—*Keith v. Kellogg*.

PARTNERSHIP—ACCEPTANCE OF DRAFT BY DIRECTION OF AGENT OF PARTNERS—POWERS OF PARTNER AFTER DISSOLUTION.—PRACTICE.—1. Where one firm was indebted to another firm, and after dissolution of the first it employed a member of the latter firm to close and wind up its business and pay its debts, and such agent, acting in behalf of his own firm, drew drafts in the name of his firm, payable to themselves, and procured a person who had before been the manager of the first firm, to accept the same in his own name as drawee, supposing he had such authority, but not giving or attempting to give such manager any authority to accept for his principals, it was *held*, that the first-named firm was not liable on the acceptances, it appearing that such manager at the time had no authority to accept the drafts on behalf of his principals. 2. If a partnership is formed for a single purpose or transaction, it ceases as soon as the business is completed, or whenever there is an end put to the business; and although a partnership is entered into for one year, it may be terminated by mutual consent at any time the partners may choose. 3. Where partners, by resolution, determine to leave the business and wind up the

same, and appoint one of their number or a third party to take charge of the property and accounts, and to dispose of the property and collect their accounts, this will amount to a dissolution of the partnership and a revocation of the powers of any other agent before that time acting for the firm. 4. In the absence of stipulation to the contrary, in case of dissolution, every partner is left in the possession of the full power to pay and collect debts due the firm, to apply the partnership funds and effects to the discharge of their own debts; to adjust and settle the unliquidated debts of the partnership; to receive any property belonging to the partnership, and to make due acquittances, discharges, receipts and acknowledgments of their acts in the premises. 5. While the dissolution does not revoke the authority to liquidate, settle and pay debts already created, it operates as a revocation of all authority for making new contracts; and since the giving of a promissory note, or the acceptance of a bill or draft, is the making of a new contract, although it may be for a firm debt, a partner after dissolution, can not thus bind the firm, or authorize another to do so. 6. Although a partnership may exist in the name of one as lessee, who is merely the agent of the firm, to transact a particular business, as the manufacture of brick, and not a member of the firm, it will not be bound by such agent making, or acceptance of commercial paper, without direct and specific authority from the firm, or some member thereof before dissolution, or unless the firm or some member during the existence of the partnership ratified the act of such agent. 7. To hold the members of a partnership liable for commercial paper, executed or accepted by direction of one member, after the dissolution, on the ground that the person taking and discounting such paper in the late firm name, and style was ignorant of the dissolution, it must be shown that the members constituting the partnership were known to the person so discounting such paper previous to the time of taking and discounting the same, especially where the acceptance fails to show who composed the firm. 8. There is no necessity to state principles or make qualifications in instructions, having no basis in the evidence, upon which to rest. 9. Although, on an appeal from the Appellate Court, this court can not go into questions of fact to ascertain where the preponderance is, it is essential to examine the evidence to see, if its tendency is such as to present a fair question of fact, to which mooted questions of law embodied in or omitted from instructions are applicable. Affirmed. Opinion by SCHOLFIELD, J.—*Bank of Montreal v. Page*.

SUPREME COURT OF OHIO.

January Term, 1880.

[Filed Nov. 16, 1880.]

DEBT—TRUST—CAUSE OF ACTION.—1. A plaintiff sued an administrator for money placed in the hands of his intestate, which it was averred was so received upon the "express trust," to be repaid to the plaintiff on the death of the intestate. *Held*, that the transaction did not constitute an equitable trust, but merely created the relation of debtor and creditor between the intestate and the plaintiff. 2. In such case, the cause of action did not accrue until the death of the intestate. 3. Where a case has been treated by the parties and the courts below, as an equitable action, and as appealable, and the case has been tried by the district court without objection, on its merits

this court will not, *sua sponte*, consider the question of error in entertaining the appeal. Judgment affirmed on terms. Opinion by WHITE, J.—*Kershaw v. Snowden*.

PUBLIC OFFICER HOLDING MONEYS OF DIFFERENT BONDS—MINGLING OF MONEYS—DEFAULT—RIGHTS OF EACH.—W was treasurer of C county from September, 1870, until September, 1872. He was *ex-officio* treasurer of the city of S and of its board of education. As received, he mingled and kept the moneys of these various corporations together. During his term of office there was a deficit. The county commissioners having, at W's settlement in September, 1872, found money in the treasury precisely sufficient to satisfy the amount due from W as such treasurer to the county, directed the same to be placed to the credit of the county, and appropriated to county purposes. *Held*, that the moneys so mingled together belonged to the several corporations *pro rata* and the county commissioners could not appropriate the whole to the exclusive use of the county; and the county, consequently, is liable in equity to account to the other corporations for their proportionate share of the fund so appropriated. Judgment affirmed. Opinion by OKEY, J.—*Comms. of Clark Co. v. City of Springfield*.

SUPREME COURT OF MISSOURI.

November, 1880.

SHERIFF'S SALES—DUTY OF SHERIFF—LIABILITY FOR MISCONDUCT.—Action by plaintiff in execution against sheriff for \$139, on the ground of misconduct resulting in the loss of the debt. The execution was levied on a printing press in the town of Glenwood, about two miles and a half from Lancaster, the county seat. An attorney at Lancaster represented the plaintiff in the execution. On the day previous to the sale as advertised by the sheriff, his deputy called on the attorney and told him the sale would take place at Lancaster, and asked about moving the press there. The attorney suggested that the sheriff had informed him that the sale would take place at Glenwood, to which the deputy replied that he wrote the advertisement and knew it would be at Lancaster. The deputy went over to Glenwood that evening, and ascertained that the sale was advertised to take place at Glenwood, but did not notify the attorney of his mistake, though ample communication by telegraph, mail, and persons passing, was open to him. The sale took place at Glenwood, the attorney remaining in Lancaster, and the press, admitted to be worth \$300, was sold for \$6. The trial court instructed the jury to find for defendant. *Held*, erroneous. The sheriff, though intrusted with large discretion, was bound to execute his duty honorably as well as soundly. While it may not have been his duty, or that of his deputy, to inform plaintiff's attorney of the time and place of sale—the advertisement did this—it was improper for him to misinform him; and having done so, and a correction of the mistake being within his power, he should have made the correction; and as that mistake led to the sacrifice of the property, he should be held liable. *Kean v. Newell*, 1 Mo. 754; *Lusk v. Briscoe*, 65 Mo. 555; *Shaw v. Potter*, 50 Mo. 281; *Conway v. Nolte*, 11 Mo. 74. Reversed and remanded. Opinion by NORTON, J.—*State, ex rel. v. Moore*.

PLEADINGS—PRACTICE—ALLEGATA AND PROBATA—MISCONDUCT OF JUDGE.—1. The material portion of the petition in this case was as follows: "That on or about the 9th day of February, 1873, in the City of Kansas, Jackson County, Missouri, the defendant not regarding its duty, and by reason of its negligence and carelessness, plaintiff was run against by one of defendant's cars, thereby throwing plaintiff upon the rail of the defendant, the said car of defendant then and there ran upon and over plaintiff. That plaintiff was then and there, by reason of the carelessness and negligence of defendant in running its said car upon and over plaintiff as aforesaid, broken and mutilated as to his right leg, to such an extent as to require its immediate amputation in order to save the life of plaintiff, thereby permanently disabling him, in all which he has sustained great loss and damage, as well in the permanent mutilation of his body as aforesaid, rendering him unable to work, and also in the great expense to which he has been subjected, and the great pain which he has suffered and still suffers, by reason of said negligence and carelessness of defendant." *Held*, that the legal and natural signification of the above allegations is, that defendant was guilty of negligence in running the cars which collided with plaintiff; but the court submitted to the jury the question of defendant's negligence in having a defective sand-box on the engine, and keeping a defective frog in the track. If the latter was the real cause of complaint, it should have been distinctly stated in the petition. Plaintiff was not entitled to recover on a cause of action not stated in the petition, and the court erred in submitting such issues to the jury. *Waldbeir v. Hannibal & St. Joe. R. Co., Cent. L. J., Mo. Add. No. 6, p. 15; Buflington v. Railroad, 64 Mo. 246.* 2. The judge who tried the case, when the jury reported, after several hours' deliberation, that they could not agree, said to them that considerable time had been consumed in the trial of the case, and it was important that they find a verdict; that they would be discharged until the next morning at half past nine o'clock; and, after the charge that they permit no person to talk about the case in their hearing, he said: "Gentlemen, come back to-morrow morning with a determination to compromise;" and court immediately adjourned for the day. On the following morning the jury took their seats in the jury box, and the judge then said to them that it was of great importance to the parties and to the county that they agree upon a verdict; that this thing of taking five days to try a case, and then having to try it all over again, was pretty expensive; that many things juries were authorized to compromise, such as amounts; that very seldom twelve men went into their jury room with the same notion as to amounts, and compromises were necessary; and then directed them to retire to their room and make a verdict. *Held*, that, while this court did not question the motives which actuated the trial judge in the premises, it could not indorse his language, which was well calculated to prejudice the defendant's case with the jury. Reversed and remanded. *Opinion by HOUGH, J.—Edens v. Hannibal & St. Joe. R. Co.*

QUERIES AND ANSWERS.

ANSWERS.

46. [11 Cent. L. J. 398.] Replevin will lie for choses in action, as notes, checks, bonds, bank bills, etc. The authorities are numerous and harmonious. *Graves v. Dudley, 20 N. Y. 76; Birdsall v. Russell, 29 N. Y. 220.* Ordinarily replevin will lie where trover will, and always, so far as the kind of property wrongfully detained is

concerned. *4 Mich. 295; Sawtelle v. Rollins, 10 Shep. 196; Sudbury v. Stearns, 21 Pick. 148.* Trover for choses in action has been sustained in many cases. *Comparet v. Burr, 5 Blackf. 419; Moody v. Keener, 7 Porter, 218; Kingman v. Pierce, 17 Mass. 247; Booth v. Sowers, 56 N. Y. 22; Decker v. Matthews, 12 N. Y. 313; Wookey v. Pole, 4 B. & Ald. 1.* Of course, if the action is for money or negotiable paper in hands of a bona fide holder for value, the action will fail upon that ground. *Wookey v. Pole, 4 B. & Ald. 1; Miller v. Race, 1 Burr. 452; Hartop v. Hoare, 3 Atkyns, 59; Spooner v. Holmes, 102 Mass. 503; s. c. 3 Am. Rep. 491.* In *4 Bac. Abr. 385*, folio edition of 1778, it is said, "So replevin does not lie of deeds or charters concerning lands; for they are of no value, but as they relate thereto." But in a note it is said, "detinue will lie for deeds." In *Hammond's Nisi Prius, 372*, it is said, "Replevin can not be maintained for writings which concern the reality." Citing *1 Brownl. 168.* With us this action has a much wider scope than by the early English law. *Mennie v. Blake, 6 El. & B. 842; 1 Chit. Pl. 181, 16 Am. ed.* And includes in its principles the action of detinue. Indeed, four replevin action is much nearer the English action of "detinue," than their replevin, which originally only extended to reclaiming wrongful distresses. Detinue will lie for deeds which are the muniments of title to real estate. *1 Chit. Gen. Pr. 95; 1 Chit. Pl. 137 (16th Am. ed.); Atkinson v. Baker, 4 T. R. 229; 3 B. & Ad. 174; 4 Bing. 106.* Replevin or trover will lie for such deeds. *Towle v. Lovet, 6 Mass. 394; Weiser v. Zeisinger, 2 Yeates (Pa.), 537; Kingman v. Paine, 17 Mass. 247; Sawyer v. Baldwin, 11 Pick. 492; Sudbury v. Stearns, 21 Pick. 148; Wilson v. Rybolt, 17 Ind. 391; see 34 Ill. 523; 13 Ill. 192.* Title deeds are personal property, although they pass to the heir with the land. *D. L. A. Sherburne, N. Y.*

47. [11 Cent. L. J. 398.] A judgment is not abated by death of the party by whom recovered. *Bliss Code Pl. 344; 2 Tidd Pr. 938, 1118.* When docketed, it becomes a debt by contract of record. *1 Story Cont. sec. 2; 1 Chit. Cont. 3 (11th Am. ed.).* An administrator can sue thereon as on any other contract with the deceased. *2 Redf. Wills, chap. 6, § 1, p. 102.* If he wishes to proceed on the judgment by execution, he must have a *scire facias* or revivor. *2 Tidd Pr. 1118; 49 N. Y. 125.* *D. L. A. Sherburne, N. Y.*

49. [11 Cent. L. J. 398.] By the common law of England the attorney's lien has priority, and by the law of Georgia the lien of A's attorney has priority of all liens except liens for taxes. See *Code of Georgia, sec. 1989; 14 Ga. 79; 45 Ga. 167, and in 50 Ga. 299.* the attorney's lien has priority over "a judgment existing against his client at the time the agreement" (for fees) "was made." Many other decisions of the Supreme Court of Georgia are to the same effect. *R. B. TRIPPE, Atlanta, Ga.*

49. [11 Cent. L. J. 398.] X has the prior lien; he had a lien upon the judgment he recovered in favor of A, the moment it was rendered. Attorneys at law and solicitors in equity have, undoubtedly, a general lien upon all papers and documents in their possession, not only for services rendered in the particular cause in which the papers and documents come to their possession, but also for the costs and charges due to them for other professional services and employment in other causes. This lien extends to all monies received and judgments recovered. See *Ex parte Plitt, 2 Wall. 453; Pinder v. Morris, 2 Caines, 165; Rooney v. R. Co., 18 N. Y. 368; Martin v. Hawks, 15 Johns. 408; MacDonald v. Napier, 14 Ga. 99; Patten v. Wilson, 34 Pa. St. 299; Frost v. Belmont, 6 Allen, 152; Gammon v. Chandler, 30 Maine, 152.* Even if the fee were a contingent one, it would make no difference. *Hill v. Cunningham, 25 Tex. 31; Wylie v. Cox, 15 How. 415.* As the creditor of A comes into a court of equity seeking to apply the judgment obtained by X in favor of A, to the payment of his claim, the court would, upon the general principle that he "who seeks equity must do equity," compel him to allow X, by whose labor the fund was created, a reasonable compensation therefor. *B. B. BOONE, Mobile, Ala.*

CURRENT TOPICS.

Two questions of appellate practice were determined in the Supreme Court of the United States last week in the case of *Hunnicut v. Peyton*, the opinion of Mr. Justice Strong, who spoke for the whole court, abounding in learning and authority on both points. The verdict in the case was rendered Feb. 17, and on the 24th of the same month a writ of error was sued out. The defendant's bills of exceptions, upon which their assignments of errors were founded, were signed by the trial judge on Feb. 28 and filed on March 1. This was during the term at which the cause was tried, but eleven days after the verdict was rendered. The plaintiffs' counsel was present when the bills were signed, and objected on the ground that they were not presented for signature within the time limited by the rule of the court. That rule was as follows: "No bill of exceptions will be signed unless presented to the judge within five days after the close of the trial, unless further time be allowed by the court." No objection was made to the correctness of the bills, or to their signature because a writ of error had been sued out. On the 1st of March an order was made by the court extending the time for presenting and filing the bills until that day (the plaintiffs objecting to the order), and accordingly the bills were then filed. In the Supreme Court of the United States it was insisted that the bills of exception could not be considered because they were not properly up for review, and this for several reasons, the first being that they were not presented to the trial judge within the time prescribed by the rule of court just cited. But the court held that this was not fatal. "The rule requiring the presentation of bills for the signature of the judge within five days," said Mr. Justice Strong, "is not a rule which controls his action. He may depart from it in order to effectuate justice. *Stanton v. Embry*, 93 U. S. 552. It is a direction to the parties, and it expressly reserves the power to enlarge the time. It is no doubt necessary that exceptions should be taken and, at least, noted before the rendition of the verdict, but the reduction of the bills to form, and the signature of the judge to the bills, required for their attestation, or, as said in the statute of Westminster, 'for a testimony,' may be afterwards, during the term. In practice it is not usual to reduce bills of exception to form and to obtain the signature of the judge during the progress of the trial. Nor is it necessary. The statute of Westminster did not require it. It would greatly and uselessly retard the business of courts were it required that every time an exception is taken the progress of the trial should be stayed until the bill could be reduced to form and signed by the judge. For this reason it has always been held that the exception need only be noted at the time it is made, and may be reduced to form within a reasonable time after the trial is over. *U. S. v. Bretling*, 20 How. 254; *Stanton v. Embry*, 93 U. S. 555; *Dredge v. Forsythe*, 2 Black. 568. The time within which the signature of the judge must be applied for, if within the term, is left to the discretion of the judge who noted the exception when it was made. It may depend much upon the nature of the bill. Some require much more time for preparation than others. It is true a judge can not be permitted to make up a statement of facts, after the writ of error is issued, upon which the case shall be heard. *Genes v. Bonnamer*, 7 Wall. 566. That is quite a different matter. But when an exception has been taken at the trial and noted, reducing the exception to form afterwards and attesting it, is not making a new

case. It is merely verifying the case as it appeared on the trial."

Another objection to the bills of exception in *Hunnicut v. Peyton*, *supra*, was that they were not signed nor filed *nunc pro tunc*, but that they appeared on their face to have been signed and filed ten days after the trial. The Supreme Court held, however, that the absence of any order that the bills should have the same effect as if they had been signed and filed during the trial, was not a fatal objection. Said Mr. Justice Strong: "The order of March 1st, extending the time for signing and filing, is equivalent to such an order. And the fact that the date of the signature was the 28th of February, is of no practical importance. At most it is only an irregularity. It is not a void act. Perhaps the bills would have appeared more regular had they been dated February 17th, but they are recitals of what occurred at the trial, and they show that the exceptions were then taken—taken in time. If it be kept in mind that the judge's signature is required only for 'testimony' that the exception was taken at the trial, and before verdict, it can not be material that the testimony was given after the close of the trial, if given during the term. We do not overlook what was said by Duval, J., in *Walton v. U. S.*, 9 Wheat. 657. We gather the facts of that case only from the opinion of the court. From that it appears that the bill of exceptions did not show that any exception was taken at the trial. That, of course, was a fatal defect. But Duval, J., after having noticed that fact, went on to make some general observations. After stating that it will be sufficient if the exception be taken at the trial, and noted by the court with the requisite certainty, and that it may afterwards, during the term, according to the rules of court, be reduced to form and signed by the judge, he added: "But in all those cases the bill of exceptions is signed *nunc pro tunc*, and it purports on its face to be the same as if actually reduced to form and signed pending the trial. And," he said, "it would be a fatal defect if it were to appear otherwise; for the original authority under which bills of exceptions are allowed, has always been considered to be restricted to matters of exception taken pending the trial and ascertained before the verdict." These remarks were not necessary to the decision of the case, and they are unsustained by any authority, so far as we know, that existed when they were made. In *Ex parte Bradstreet*, 4 Pet. 107, C. J. Marshall said, a practice to sign a bill of exceptions after the term must be understood to be a matter of consent between the parties, unless the judge has made an express order in the term allowing such a period to prepare it. No intimation was given that the signature must be *nunc pro tunc*. *Walton v. U. S.*, was referred to in *Law v. Merrill*, 6 Wend. 278, by one of the judges, and the language of Judge Duval was quoted, but it was unnecessary to a decision of that case. The bill there had been signed a year after the trial, by a judge who had not tried the cause. We find no case which can be regarded as as authoritative decision that a bill of exceptions, signed during the term at which the trial took place, though after the close of the trial, must be antedated to make it effective, or ordered to be filed *nunc pro tunc*, as of a time during the trial. Nor can we discover any reason for such a requirement. During the term the records of the term are before it for amendment in matters of form, and whether a bill was signed as of a date after judgment if during the term, or antedated to a time during the trial, is a question of form only if it appears that the exceptions were in fact taken before verdict and during the pro-

gress of the trial. Confessedly it may be signed after judgment, as of a date before, and be effective, though the date of the signature in such a case is false. Why should giving to the signature its true date destroy it? The reason why it is required that a bill shall be presented for signature during the term, (except in extraordinary cases, when delay is allowed by the judge), is that the facts appearing and rulings made at the trial may be fresh in his memory. Are they any more fresh in his memory when he antedates the bill, or orders it to be filed as of the date of the trial, than when he gives to the signature and filing their true date? We can not doubt that in a multitude of cases bills of exception have been signed after judgment, and filed without any order that the signature and filing be entered *nunc pro tunc*, but when the true time of the signature appeared, and have been treated as sufficient, whenever they have shown that the exceptions were taken during the trial. And, we think, it would be a surprise to the profession, and work great wrong to suitors, were we to hold such bills invalid. In *Neece v. Heely*, 23 Ill. 416, exceptions were duly taken at the trial. The record showed that the bill of exceptions was signed three days afterwards, but during the term. It was held that the bill was good, and that the record need not explain the delay. So it was ruled in *Illinois R. Co. v. Palmer*, 24 Ill. 416, that if the bill of exceptions clearly shows that exceptions were taken at the proper time, it is immaterial that it was not signed till some days after the trial, and that it spoke in the present tense. In *Dean v. Gridley*, 10 Wend. 254, *Savage, C. J.*, declared that it was not required the bill should be so drawn as to appear to have been signed upon the trial, whether it was so or not. He was speaking of the Supreme Court of Errors. See *Hollowell v. Hollowell*, 1 Monroe, 130; *Hughes v. Robertson*, Id. 215.

A third objection to the appeal in *Hunnicut v. Peyton*, *supra*, was that the defendants waived their exceptions by suing out the writ of error before the signature of the judge was obtained, this being the rule as stated in *Tidd's Practice*, 863, citing *Dillon v. Parker*, 11 Price, 100. But the Supreme Court, after showing that *Dillon v. Parker* did not sustain the text of *Tidd*, said: "But if that is the rule in the English courts, it is not imperative even there. Where the presentation to the judge has been delayed from the default of the defendant in error, or for other sufficient reasons, the court of errors will allow the bill of exceptions, when signed, to be tacked to the record as of the time when the record was removed. *Taylor v. Williams*, 2 B. & Ad. 846; *Id.* 6 Bing. 512. The case is reported also in 4 M. & P. 257, where the facts are fully stated. On a trial of a case before Chief Justice Tindal, on the 23d of December, a bill of exceptions was tendered, the substance of which was reduced to writing and given to the officer of the court before the termination of the cause, but it was not then signed and sealed. There was a verdict for the plaintiff. The defendant sued out a writ of error in the King's Bench. Subsequently, on the 11th of February following, the bill of exceptions in an amended form was settled by the counsel for the parties, and a copy was sent to the plaintiff's attorney that he might accede to its terms or suggest alterations before it was sealed by the chief justice. At the same time, the defendant served a rule to transcribe the record for return with the writ of error. The bill not having been returned, the court granted an order for its return. It was

argued against the rule (and *Dillon v. Parker*, was cited in support of the argument) that the bill was waived, and that by the writ of error and the rule to transcribe, the record had been removed into the King's Bench. But the court, all the judges concurring, retained the order upon the attorney, holding that the chief justice might seal the bill. It is not, therefore, by any means settled, even in England, that suing out a writ of error is a waiver of unsigned bills of exceptions. We know of no decision in this country that asserts or gives any countenance to such a rule, or any reason that justifies it, unless it be one in New York, to which we shall refer. True, a writ of error here, as in England, is supposed to remove the record of the court to which it is directed into the superior tribunal. But this is a mere fiction. In neither country is the record itself actually sent up. A transcript only is sent. In England, at common law, a writ of error operated as a *supersedeas* and stayed all action of the inferior court, and thence it was regarded as removing the record and ousting the jurisdiction of that court. The law there has been changed. And here, the writ is of itself no *supersedeas*. If there be no bail for a *supersedeas*, a writ does not stay the action of the trial court. An execution may be issued and executed though a writ of error is pending. Much more, it would seem, must the court to which the writ is sent have power, during the term in which the case is tried, to put its records and proceedings in form to return them in obedience to the writ. If that can not be done, great hardship and injustice would in many cases be the result. As we have said, bills of exceptions can not always be formally prepared until a considerable time after verdict and judgment. They may require, in some cases, a full statement of almost all that occurred at the trial. Papers necessary to be incorporated may be mislaid or withheld by the opposite party; the charges of the judge, to which exception has been taken, may not have been filed, or sickness may have interfered. Meanwhile, judgment on the verdict may have been entered, and unless the party can protect himself by a writ of error, an execution may follow. For these reasons, the universal practice is to give reasonable time to make up the bills of exception and obtain the signature. This is not altering the record; it is completing it. It is not exercising jurisdiction over the case. It is merely putting into form the record statement of what was done before the writ of error was sent down. In *Brown v. Bissell*, 1 Dougl. 1 Mich. 273, where a bill of execution returned with a writ of error appeared to have been signed after the writ was sued out, it was held to be, at most, whether at common law or under the statute, a mere irregularity, which was waived by a joinder in error. *Wilbeck v. Wayne*, 8 How. Pr. 433."

A question in regard to interest on legacies, which does not seem to have often arisen, was determined by the Supreme Court of Missouri in the late case of *State v. Adams*, where it was held that there having been a contest over a will, interest would be afterwards allowed on a legacy given by it, from the day the proceedings to contest were ended, and not from a year after the testator's decease, as under the general rule. "While the suit contesting the will was undetermined," said the court, "the executrix could not carry into effect the provisions of the will, and could not, therefore, be in default to the legatees. Interest should have been allowed only from the time

the suit to contest the will was dismissed, and not from the date of the first annual settlement." The only other case we believe in the books in which the point is noticed is *Vandergrift's Appeal*, 80 Pa. St. 116.

The *Albany Law Journal* notes from an Austrian legal paper the following decision on the subject of Rewards: A's servant had embezzled 37,000 florins and had fled. A went to the director of police at Prague and formally declared before him that he would give ten per cent. of the sum found with his servant on his arrest. The police authorities published this offer of reward in the newspapers. A few days thereafter, B delivered A's servant into the hands of the police. 17,372 florins were found on his person. A refusing to pay B ten per cent. of this sum, B brought suit for 1,737 florins. The trial court nonsuited him, it appearing that the servant had voluntarily come to B and given himself up to him, and that then B had merely accompanied the servant to the police station. B appealed, and the Bohemian Supreme Court, and on A's further appeal, the Imperial Appellate Court, both decided that B was entitled to the reward. They held that A was only interested in the success consequent upon his offer of reward; the manner and mode of effecting it must be immaterial to him. He has no right to scrutinize the action of B, his intent or meritoriousness. Because the servant was arrested, and a part of the money restored to A, he must pay the promised reward to the person who brought this about. Without B, the servant might have changed his mind, concealed himself and wasted the money. For examples of different phases of the subjects of Finders and Rewards, and the law thereof, see 3 Cent. L. J. 379; 4 Id. 384; 5 Id. 22, 417; 7 Id. 204; 8 Id. 23; 9 Id. 478.

NOTES.

—Sir Alexander James Edmund Cockburn, Chief Justice of England, who died suddenly on the 21st ult., was born in 1802; became a Q. C. in 1841; attorney-general in 1851; Chief Justice of the Common Pleas in 1856, and Chief Justice of England in 1859. His greatest professional triumph was his prosecution of the prisoner Palmer; though perhaps his greatest notoriety came from his charge in the Tichborne trial, which was a masterly production, and would have enhanced his reputation had his position in the case been that of advocate instead of judge. His great speech in the Palmer case is quoted from at length and analysed by Mr. Harris in his "Hints on Advocacy." The *New York Tribune's* correspondent writing of the effect of his death in England, says: "Nobody disputes the brilliancy and variety of Cockburn's talents, but the bar never recognized him as a great lawyer, and a powerful sect of society always denied him admission. Right Hon. Sir George Jessel, Master of the Rolls, perhaps the ablest lawyer of this generation, in pronouncing the formal panegyric in court, conspicuously omitted to praise his judicial qualifications. Several judges during the week complained severely of the indiscriminate laudation of the press, criticising Cockburn's absence of

sound learning, his excessive love of display and eagerness to preside at sensational cases. Society remembers against Cockburn some early scandals and the life-long irregularity of his domestic relations; nevertheless, it is true that he was exceedingly welcome in many influential circles, and will be long remembered for his shining conversational gifts." Chief Justice Cockburn was best known in this country from his connection with the Alabama Arbitration at which he was the British member of the commission. He did not agree with his colleagues, and declined to sign the award made in favor of the United States, his dissenting opinion being long and elaborate. He concurred in holding Great Britain liable in the case of the Alabama, though differing from the grounds on which the decision of the tribunal was founded. With respect to the Florida and Shenandoah, he declared that he could not too strongly express his dissent from the decisions arrived at. The course of Sir Alexander Cockburn at the conference was afterward strongly criticised by the Hon. Caleb Cushing, one of the counsel for the United States, in a volume printed in 1876, entitled "The Treaty of Washington." Mr. Cushing declared that neither Sir Alexander's "original constitution of mind, nor the studies, pursuits, or habits of his life, had fitted him for calm, impartial, judicial examination of great questions of public law;" and he is further charged generally with "petulant irritability and unjudicial partisanship of action."

—Chief Justice Coleridge of the Court of Common Pleas succeeds Cockburn as Lord Chief Justice of England.—Judge Jackson of the Georgia Supreme Court has been appointed Chief Justice of the State, vice Bleckley resigned.—A call is published to the bar of this State to meet by representatives at Kansas City on the 28th inst., to consider the question of the crowded state of the Supreme Court docket, and to devise means for its relief. The address is as follows: "In view of the hopelessly embarrassed condition of the docket of the Supreme Court, and the universally recognized necessity of some relief to the court, and in view of the probability of some action by the legislature at its approaching session, it is believed that the lawyers of the State should come together to consider this matter and devise some well-considered plan which may be submitted to the General Assembly when it assembles at Jefferson City in January. To this end a convention of lawyers is called to meet at Kansas City, on Tuesday, the 28th day of December, 1880, at 10 A. M., at such place as may be provided, to consider and mature such plan as will insure its adoption and bring the desired relief both to the court and the litigants before it. Each and every bar of the State is requested to select and send to this convention one or more of its members, and the clerk of the circuit court of each county is requested to call a meeting of the bar of his county for that purpose." —It is said that to him who goes to law nine things are requisite. In the first place, a good deal of money; 2d, a good deal of patience; 3d, a good cause; 4th, a good attorney; 5th, good counsel; 6th, good evidence; 7th, a good jury; 8th, a good judge; and 9th, good luck.—A debating society discussed the question: "Is it wrong to cheat a lawyer?" After full discussion and mature deliberation, the decision was, "not wrong, but too difficult to pay for the trouble."—In *Dotson v. State*, 62 Ala. 141, it is held that one who carries concealed on his person all the separate pieces of a pistol, capable of being readily and effectively put together, is guilty of carrying concealed weapons.